SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-1575

JACK KIRSCHKE,

Petitioner

vs.

CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

COURT OF APPEALS

OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 1

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TABLE OF CONTENTS

Table of Authorities ii
Preamble 1
Opinion Below 2
Jurisdiction 2
Questions presented for Review....5
U.S. Constitutional Amendments....8
Statement of the Case 10
Reasons for granting
WRIT OF CERTIORARI.....33
Argument 35
Appendix .....following 72
Conclusions ..... Final
APPENDIX A - IN RE KIRSCHKE, 53 CAL. App. 3d 405, 125 Cal.Rptr. 680 (Dec. 2, 1975)
APPENDIX B - IN RE KIRSCHKE, NOV.1, 1973 (Habeas Corpus)
APPENDIX C - DENIAL, PETITION FOR REHEARING
APPENDIX D - DENIAL, PETITION FOR HEARING
APPENDIX E - PROSECUTORIAL ARGUMENT TO THE JURY CONCERNING POLICEMAN DE WAYNE ALLEN WOLFER

TABLE OF AUTHORITIES

CASE	PAGE APPEARING
Alcorta v. Texas 355 U.S. 28	4, 8, 24
Blackburn v. Alabama 361 U.S. 199	7
Brady v. Maryland 373 U.S. 83	6, 49, 50
Chapman v. California 386 U.S. 18	7,8,24, 52,56
In Re Ferguson 5 Cal. 3d 525	60,61,62
In Re Imbler 60 C. 2d 554	57, 59
In Re Kirschke 53 Cal. App. 3d 405 125 Cal. Rptr. 680	1, 2, 22, 26 27, 35, 69
In Re Winship 397 U.S. 358	4, 5, 6, 67 70, 72
Mesarosh v. United States 352 U.S. 1	4, 6, 24, 28 62, 63, 64
Miller v. Pate 386 U.S. 1	4, 8, 24
Moore v. Michigan 355 U.S. 155	7
Mullaney v. Wilbur 421 U.S. 684	5, 67, 72

Napue v. Illinois 360 U.S. 264	4, 7, 8, 24, 49
People v. Ruthford 14 Cal. 3d 399	49, 52, 55, 56
Townsend v. Sain 372 U.S. 293	7, 65, 67, 70 71
United States v. Giglio 405 U.S. 150	4, 8, 24

United States Constitution

Amendment 6	8
Amendment 14	9

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JACK KIRSCHKE, Petitioner v. CALIFORNIA, Respondent	PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION 1

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW JACK KIRSCHKE, BY HIS ATTORNEY, ROGER S. HANSON, ESQ., a member of the Bar of the United States Supreme Court, and petitions this Honorable Court for a Writ of Certiorari directed to the Court of Appeals of the State of California Second Appellate District, Division 1, to review that certain published decision IN RE KIRSCHKE, 53 Cal. App. 3rd 405, 125 Cal. Rptr. 680, December 2, 1975, denying a petition for Writ of Habeas Corpus.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, Petitioner submits the following:

(a)

OPINION BELOW

The official and unofficial report and citation of the judgment herein sought review is IN RE KIRSCHKE 53 Cal. App. 3rd 405, 125 Cal. Rptr. 680, December 2, 1975.

This opinion was rendered by Division 1 of the California Court of Appeals Second Appellate District. A copy of this opinion is appended as Appendix "A".

This opinion was preceded by an opinion denying a Petition for Writ of Habeas Corpus by the Los Angeles County Superior Court entered November 1, 1973, by Superior Judge Honorable George M. Dell. This judgment was unreported in either the official or unofficial reports, and is herewith attached as Appendix "B".

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is in-

voked are:

(i) the date that the judgment which is sought to be reviewed was entered is December 2, 1975;

(ii) a petition for rehearing was made and denied on December 29, 1975 by the Court of Appeals, Second Appellate District, Div. 1. (Exhibit "C"). The Supreme Court of California denied a Petition for Hearing on January 28, 1976 and all State remedies have been exhausted. (Exhibit "D");

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1257 (3) which provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
...By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the

Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Jurisdiction of this Honorable Court is further invoked because the California Court of Appeals, Second Appellate District Division 1, has decided several federal questions in a way not in accord with applicable decisions of this Honorable Court. Napue v. Illinois, 360 U.S. 264; Alcorta v. Texas, 355 U.S. 28; United States v. Giglio, 405 U.S. 150; Miller v. Pate, 386 U.S. 1; and the cases cited therein.

Further, the state courts of California in this case have decided a federal question of substance not heretofore determined by this Honorable Court, insofar as whether an analogous decision rendered by this Court is applicable to the states as a matter of due process of law under the 14th Amendment, within the meaning of Mesarosh v. United States, 352 U.S. 1 and In Re Winship, 397 U.S. 358.

Jurisdiction of this Honorable Court is further invoked inasmuch as the Court

of Appeals of the State of California has improperly refused to consider, as it must under the decisions of this Court in In Re Winship, 397 U.S. 358, and Mullaney v. Wilbur, 421 U.S. 684, whether there any longer is sufficient evidence to convince beyond a reasonable doubt, whether Petitioner is guilty of murder after new evidence has been discovered and presented which scientifically convinces that Petitioner could not have killed his wife and her lover.

(c)

QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal defendant in a state prosecution for murder is denied due process of law by the prosecution falsely representing a state witness police officer as an "expert" in medical and physical sciences and criminalistics, the said "expert" presenting and adducing key and critical testimony and courtroom demonstrations in forensic firearms identification and post-mortem human pathology and principles of physics and mechanics, the key and critical portions of which were false, and where,

upon demand under oath for truth about the professional and the educational backgroundof the said police officer, within the meaning of Brady v. Maryland 373 U.S. 83, 87, the said police officer wilfully, negligently or inadvertently suppressed the truth and substituted false and more highly qualified credentials?

2. Whether a criminal defendant in a state prosecution for murder is denied due process of law whenever the state presents key, critical and material false evidence going to the guilt-innocence determination and the merits of the case, whatever the cause of said false evidence and irrespective of whether said false evidence is wilfully, negligently, or inadvertently presented, and whether such reasoning of this Honorable Court set forth in Mesarosh v. United States, 352 U.S. 1, in its supervisory role over the lower federal court system, shall be applied to the states as a matter of due process of law within the meaning of In Re Winship, 397 U.S. 358?

3. Whether the state court record on

appeal and the state court evidentiary hearing evidence support the conclusion of the California Court of Appeals that the testimony presented by the state witness police officer who wilfully, negligently, or inadvertently falsified his credentials and his key scientific testimony "could not, beyond a reasonable doubt, have affected the outcome of the trial", within the meaning of Napue v. Illinois, 360 U.S. 264, 269, and Chapman v. California 386 U.S. 18, 24 (1967)?

4. Whether this Honorable Court must, de novo, carefully examine the state record "where the fundamental liberties of the person are claimed to have been infringed", and where it is here alleged that the state court factual determinations are not fairly supported by the record at trial and upon reference hearing, within the meaning of Townsend v. Sain 372 U.S. 293, 316; Blackburn v. Alabama 361 U.S. 199, 208, 209; and Moore v. Michigan 355 U.S. 155?

5. Whether the California Court of Appeals can properly apply the Federal

Harmless error rule of Chapman v. California 386 U.S. 18, 24 (1967) to key, material and false prosecution evidence going to the merits of the case, which was achieved by either wilfully, negligently or inadvertently falsifying key scientific evidence and educational background of the proponent state witness or whether the applicable decisions of this Honorable Court require a reversal of the conviction, per se, without recourse to any harmless error rule, within the meaning of Napue v. Illinois 360 U.S. 264, 269; Alcorta v. Texas 355 U.S. 28; Miller v. Pate, 386 U.S. 1; Giglio v. United States, 405 U.S. 150?

(d)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

Sixth Amendment-

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously as-

certained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment-

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(e)

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED:

1. Petitioner JACK KIRSCHKE was a deputy Los Angeles County District Attorney in April, 1967.

2. He was married to ELAINE TERRY KIRSCHKE, and they lived at 185 Rivo Alto Canal, Naples, Long Beach, California.

3. In the early morning hours of 2:30 a.m., Saturday, April 8, 1967, ELAINE TERRY KIRSCHKE was shot to death in her own bed at the home. With her, and similarly shot to death, was one ORVILLE WILLIAM (BILL) DRANKHAN, 41, a reported romantic companion of Elaine.

4. Both Elaine and Bill were killed by apparent .38 caliber gun shot wounds, a single bullet in the brain of each, constituting the cause of death.

5. No direct evidence whatsoever was ever adduced at trial to establish the identity of the killer; no direct evidence linked this petitioner to the killings and all competent, direct evidence

exonerated this petitioner.

6. On Monday, April 10, 1967, at about 7:00 a.m., Petitioner KIRSCHKE was arrested on the interstate highway leading from Las Vegas, Nevada, to Los Angeles, by the California Highway Patrol, and ultimately charged with the killings. He was returning from a weekend Rotary Convention that he attended in Las Vegas, Nevada.

7. He was indicted by the Los Angeles County Grand Jury in mid summer, 1967, and was tried that fall and convicted of both killings following a nationally publicized trial.

8. A death sentence returned by the jury was set aside in August, 1968 by the trial judge, the Honorable Kathleen Parker, and a life sentence was imposed.

9. An appeal taken to the California Court of Appeals resulted in affirmance of the conviction on July 28, 1972, in an unpublished opinion.

10. No direct evidence linked KIRSCHKE to the killings, and an extensive factual and scientifically based alibi developed through professional witnesses and total strangers, scientifically and fact-

ually exonerated KIRSCHKE, he being on the road to Las Vegas, Nevada in an automobile at the time the killings occurred, and at the time the killer moved the dead body of Orville Drankhan, he was in Las Vegas, Nevada.

THE MEANING & CONSEQUENCES OF HUMAN POST-MORTEM LIVIDITY IN THIS CASE:

11. The bodies of Elaine and Bill were found in the Kirschke bedroom about 8:00 p.m. on the evening of Sunday, April 9, 1967 by the Kirschke's upstairs neighbor George F. Cornell, and his son-in-law, one James Miller.

12. Elaine was nearly nude and was found laying on her back on the bed.

13. Bill was fully clothed and was found laying on his stomach beside the bed.

14. Human post mortem lividity, or livor mortis, is the gravitational descending of the blood into the skin capillaries of the most dependent area of the dead human body which commences after heart stoppage; it leaves the area of the body into which it descends a cherry-

red color.

15. In the typical human body, lividity is first discernible after about 2 hours following death, but if the body is then mechanically reversed, the blood will drain out of the initial area into the skin capillaries of the opposite side of the body, which is now dependent following the body's reversal.

16. If the body lays undisturbed for a minimal length of time, generally conceded to be at least 6 hours, or by some authorities 8 to 12 hours, the lividity will not disappear as the blood has become permanently fixed in the original area due to chemical changes in the protein of the blood cells; reversal of the body after 6-8-12 hours will not then be accompanied by a migration of the blood from its original situs in the dependent skin capillaries to the skin capillaries of the opposite side of the body.

17. Fixed, permanent, irreversible post mortem lividity is a certain means of ascertaining that a body died in a given position, laid in that position for at least 6-8-12 hours, and if found

in a position not compatible with that position expected from the location of the fixed, irreversible lividity, it is certain means of ascertaining that some other live person moved the body after the minimal time of 6-8-12 hours had elapsed, or that some non-human "phenomenon" caused the body to move.

18. The body of Orville "Bill" Drankhan was found on its stomach. It had fully fixed and permanently set post-mortem lividity on its back, conclusively establishing that the body had lain on its back for at least 6 hours after death, and was thereafter turned over by either a human source or a non-human "phenomenon".

19. The body of Elaine was found on its back and had the expected post-mortem lividity on its back.

THE TESTIMONY OF KEY PROSECUTION WITNESSES CALLED TO TESTIFY AT TRIAL CONCERNING THE TIME OF THE SHOOTING OF ELAINE & BILL:

20. A neighbor of the Kirschkes testified that she was walking her dog past the Kirschke apartment about 9:30 p.m. on Friday, April 7, 1967. Because of

the large non-curtained window, she saw Elaine and Bill alive and conversing in the Kirschke living room.

21. Another neighbor walked past the same large window about 10:30 p.m. That neighbor saw Elaine, Bill, and a third person alive in the Kirschke home. No evidence was adduced to ascertain even the sex of that third person, and the prosecution could not establish the identity of that third person whatsoever.

22. A host of prosecution witnesses placed Elaine and Bill alive, dancing and drinking at the Long Beach Yacht Club, a short 12-15 minute car drive or walking time from the Kirschke home, between 11:00 p.m. on Friday, April 7, 1967 through the closing of the club about 1:00 a.m. on Saturday, April 8, 1967.

23. George Franklin Cornell and his wife Betty were awakened from their sleep in their bedroom in their apartment by loud noises, arguing between people below in the Kirschke flat, and apparent banging around of furniture. The alarm clock beside the bed indicated 2:15 a.m. Unable to sleep, Cornell a-

rose, lit a cigarette, and smoked it while sitting on his bed.

24. At 2:30 a.m. 2 loud reports rang out. While the prosecutor elicited from his own witness that "maybe the clock indicated either 1:30 a.m. or 3:30 a.m.", in general the best indication of the time of the shooting was 2:30 a.m. on Saturday, April 8, 1967, which was established by the foregoing prosecution wittnesses.

25. Mrs. George Cornell essentially corroborated her husband's testimony.

26. At a little before 4:00 a.m., a downstairs neighbor in an adjacent home became ill and went to his bathroom.

27. While sitting on his toilet stool, he saw the light go out in the adjacent bedroom of Petitioner Kirschke's home. He looked at his watch. The time was 4:00 a.m., Saturday, April 8, 1967.

28. At circa 8:30 a.m., Saturday, April 8, 1967 one Bob Lancaster, a bell-hop at the Las Vegas, Nevada, Stardust Hotel checked Petitioner Kirschke into Room 415. The Rotary Convention attended by Petitioner Kirschke headquartered at this

hotel.

29. It is 4 hours and 32 minutes in driving time from Long Beach, California at the home of Petitioner to the Stardust Hotel in Las Vegas, Nevada, allowing 6 minutes for a gas stop.

30. Since petitioner was found in Las Vegas at 8:30 a.m., the prosecution concedes that he could not have been in the Long Beach home at any time after 4:00 a.m. on Saturday, April 8, 1967.

31. Petitioner drove from the Los Angeles International Airport area to Las Vegas, Nevada by Volkswagon automobile during the early morning of April 8, 1967, at the same time that the killing occurred.

32. For a shooting that occurred at 2:30 a.m. until, under the theory of the prosecution, a mandatory death scene departure time of 4:00 a.m., at which time the prosecution conceded that Petitioner Kirschke must have departed the home to drive to Las Vegas to get there by 8:30 a.m., is but 1-1/2 hours, even assuming that

death occurred instantaneously.[1]

33. One and one-half hours is a scientifically impossible time for the lividity to permanently fix in the back of Bill Drankhan to allow Petitioner to move the body just before he was alleged to depart the death scene, under the prosecution's theory of the case, at 4:00a.m.

34. Under all recognized medical authorities, the body of Drankhan could not be moved for at least 6 hours, i.e., not before 8:30 a.m., the exact time that Petitioner was checking into a Las Vegas, Nevada hotel some 300 miles and 4 1/2 hours away.

35. It is conclusively shown and scientifically shown therefore, that if a human being caused the movement of the Drankhan corpse, it could not be Petitioner Kirschke.

---

[1]History shows that gun shot wounds in the human brain often fail to cause immediate death; Abraham Lincoln lingered for many hours in a cheap room across the street from Ford's Theatre; Senator Robert F. Kennedy remained alive for over a day in Los Angeles following his shooting on June 4, 1968.

36. It was the trial defense argument, supported by qualified pathologists and criminalists and conceded by the prosecution "that dead bodies do not move", unaided by human beings doing the moving, and that the killer remained in the home and had moved the body after lividity had fixed, or had returned to the crime scene to move the body.

In any event, then, Petitioner Kirschke was scientifically unable to be the killer of Elaine and Bill because of the lividity fixation time juxtaposed with the Los Angeles-Las Vegas driving time, unless it could be shown that the body moved by itself by a "phenomenon".

THE PROSECUTION'S ANSWER TO HOW THE DEAD BODY OF ORVILLE"BILL" DRANKHAN MOVED LONG AFTER DEATH; THE WILFUL, NEGLIGENT, OR INADVERTENT FALSIFICATION OF THE EDUCATIONAL QUALIFICATIONS AND THE SCIENTIFIC TESTIMONY OF LOS ANGELES POLICE OFFICER DE WAYNE ALLEN WOLFER.

37. Conceding that "dead bodies don't move", the prosecution recognized that unless they could demonstrate that the

dead body of Orville "Bill" Drankhan moved many hours after death by a "phenomenon", Petitioner Kirschke was conclusively and scientifically innocent of the killing of his wife and Orville "Bill" Drankhan.

38. In testimony covering several trial days and several hundred pages of transcript, the prosecution presented one DeWayne Allen Wolfer, a Los Angeles policeman, who falsely qualified as an "expert" witness in human body dynamics, post-mortem "fluid shift", human anatomy, engineering, acoustics and physics.

39. State agent policeman Wolfer falsely testified that he had taken a course in human anatomy at the Zoology Dept. at University of Southern California wherein he as well as every student registered therein, was assigned to, and did totally and completely, dissect a human cadaver; that because of this training as well as other alleged formal courses in anatomy and physiology, he was qualified to testify; that thereafter he did testify for several days as a key rebuttal witness at Petitioner's trial in falsely demonstrating how dead human corpses moved

several hours after death because "fluid shifts" in the dead body cause a shift in the "center of gravity" and thus cause the body to move.

40. At a 3 week (March-April, 1973) evidentiary hearing ordered by the California Court of Appeals, it was demonstrated that:

(a) DeWayne Wolfer did not take a course at U.S.C. where he totally and completely dissected a human cadaver;

(b) he falsified his educational background in the foregoing area;

(c) no such "fluid shifts" occur in the dead human body due to the reasons proffered by policeman Wolfer, and hence no such "explanation" can exist for movement of dead bodies.

41 The Los Angeles Superior Court, Honorable George M. Dell, Judge, in denying relief by Habeas Corpus (Exhibit "B") excused this false key prosecution evidence as the result of a "bad memory" or "ignorance" on the part of the state witness, police officer DeWayne Wolfer.

42. The California Court of Appeals acknowledged this key and false testimony to be testimony "negligently false", "bordering on perjury", or at the very least "given with a reckless disregard for the truth". (125 Cal. Rptr. 680, 685; 53 Cal. App. 3rd 405, Exhibit "A", herewith attached).

43. The California Court of Appeals, however, erroneously concluded that the foregoing testimony "could not beyond a reasonable doubt have affected the outcome of the trial", because it "did not concern the heart of the matter". (125 Cal. Rptr. 680, 685; 53 Cal. App. 3rd 405, Exhibit "A". herewith attached).

44. Contrary to the California Court of Appeals, the credibility of policeman Wolfer was a key, material issue in the case; the means and methods by which the dead body did or did not move many hours after death was the key issue in the case, and constituted many days of testimony and many hundreds of pages of trial transcript. It was recognized by the prosecutor to be the key issue and was used by the prosecutor to circumvent the key de-

fense alibi that Petitioner Kirschke was driving to Las Vegas at the time the shooting occurred, and was in Las Vegas at the hotel at the time the killer moved the dead body of Orville "Bill" Drankhan.

45. In the Argument, and Appendix thereto, in this Petition for Certiorari, we set forth representative prosecutorial argument to the jury to show just how the prosecutor utilized the false evidence and false credibility and educational background of policeman DeWayne Allen Wolfer to achieve the illegal conviction of Petitioner Jack Kirschke for the murder of his wife Elaine and Orville W. Drankhan.

46. Judicial opinion in Exhibits "A" and "B" to this Petition now recognizes the false educational background and the false evidence given on the merits of the "fluid shift" as it was used to explain how the dead body moved.

47. The sole issue therefore is the materiality of this false prosecution evidence, and whether the Court of Appeals is correct in concluding that the false evidence in no way contributed to

the conviction within the meaning of Chapman v. California 386 U.S. 18, 24 (1967), or alternately, whether a harmless error rule is to be applied at all, within the meaning of Mesarosh v. United States, 352 U.S. 1. See also Napue v. Illinois, 360 U.S. 264, 269; Miller v. Pate, 386 U.S. 1; Giglio v. United States, 405 U.S. 150 and Alcorta v. Texas, 355 U.S. 28.

THE FALSE ACOUSTICS TESTIMONY PROPOUNDED BY POLICEMAN DEWAYNE ALLEN WOLFER:

48. The prosecutor tried to advance the time of death to an earlier hour to allow more time for lividity to form in the dead body of Drankhan, and to attempt to circumvent the alibi of Petitioner Jack Kirschke.

49. Again using policeman DeWayne Allen Wolfer, the prosecutor falsely qualified Wolfer as an "expert" in the acoustics of gun silencers.

50. Using this false testimony, Wolfer falsely testified that the shooting occurred as early as 1:30 a.m. and was unheard at that time because a "muffler" from a Briggs & Stratton lawn mower en-

gine was used to fire the death weapon through. (This is a physical and scientific impossibility). In this way, policeman Wolfer testified that "80 to 90 decibels of sound" could be attenuated from the report of the hand gun used to kill Petitioner's wife and Drankhan.

Wolfer falsely then testified that 2 loud reports heard by the upstairs neighbors at 2:30 a.m. were the body of Drankhan rolling from the bed, striking a nearby door, loudly slamming it shut, and then the body striking the floor of the apartment.

51. At the evidentiary hearing ordered by the Court of Appeals, it was established that policeman DeWayne Wolfer did not know nor understand the meaning of the term "decibel" in acoustics and was ignorant in the basic rudiments of sound transmission and gun silencers.

52. Concerning this key, false and material falsification of educational background enabling policeman Wolfer to qualify as an expert on the acoustics of gun silencers, the Superior Court excused

it as mere "ignorance", (Exhibit "B"); the Court of Appeals labelled it as "negligently false" (Exhibit "A", 125 Cal. Rptr. 680, 685; 53 Cal. App. 3rd 405.)

53. The Court of Appeals grossly errs in its opinion denying relief when it states that the acoustical testimony "could not, beyond a reasonable doubt have affected the outcome of this trial" by serving to abrogate and circumvent a factually true and unique defense alibi supported by some half dozen witnesses who were total strangers to this Petitioner, and who placed him at distances of several hundred miles from the death scene at the time of the killings.

It is absolutely false that the key material and false acoustics testimony "pertained to essentially irrelevent matter and beyond a reasonable doubt could not have affected the outcome of the trial". (Exhibit "A" 125 Cal. Rptr. 680, 685, 53 Cal. App. 3rd 405, herewith attached.)

THE FALSE BALLISTICS EVIDENCE PROPOUNDED BY POLICE OFFICER DEWAYNE WOLFER:

55. Police officer Wolfer falsely qualified as an "expert" in forensic firearms identification.

56. Testifying at Petitioner's trial that the murder weapon was Petitioner's gun "and no other gun in the world", Wolfer supported this now known false evidence by false ballistics enlarged photographs depicting alleged matches on the bullets, and these photographs are now judicially recognized and are known to depict physically impossible bullet identifications.

57. The Court of Appeals once claimed that the bullet identification evidence was the most significant evidence in the case, (unpublished July 28, 1972 opinion) and now excuses its established falseness as the product of nothing "other than an honest mistake" (Exhibit "A", 125 Cal. Rptr. 680, 684-685, 53 Cal. App. 3rd 405)

58. The significant key, false ballistics oral trial evidence infected this conviction and with the wilfully prepared false ballistics identification photographs, the prosecution achieved a conviction violative of this Court's

reasoning in Mesarosh v. United States, 352 U.S. 1.

59. The prosecutor argued long and loudly to the jury that the ballistics evidence showing the death weapon to be Petitioner's gun "and no other gun in the world" established Petitioner's guilt beyond peradventure, although no evidence ever placed Petitioner's finger on the trigger.

In the ARGUMENT and accompanying appendix, we set forth excerpts from the prosecutor's argument to the jury showing the permeating, ubiquitous effect that the prosecutor created with the false ballistics evidence.

THE DEFENSE ALIBI CONCLUSIVELY ESTABLISHING PETITIONER'S INNOCENCE, PROPOUNDED BY SOME HALF DOZEN TOTAL STRANGERS, PLACING PETITIONER MANY MILES FROM THE DEATH SCENE AT THE TIME THE SHOOTING OCCURRED:

60. Petitioner narrated a unique alibi, the details of which were given spontaneously to California Highway Patrolman Troy Richmond when Richmond arrested Petitioner circa 7:00 a.m., Monday, April

10, 1967 near Victorville, California on Petitioner's return from his long weekend in Las Vegas at the Rotary Convention.

61. Petitioner Kirschke's alibi was verified by and supported by some half-dozen witnesses, and in general each witness was called either by the defense or the prosecution, and each verified that Petitioner was at the location in question at or about the time Petitioner claimed he was there.

62. Speaking broadly, the defense sought to establish that Petitioner, KIRSCHKE, could not have carried out the killing because of a detailed alibi placing him elsewhere at the key times of the killing and events connected therewith, to wit:

(1) Robert Zimmerman, a Long Beach fireman, placed KIRSCHKE at Hof's Hut Restaurant in the Long Beach Marina between 7:30 - 8:00 p.m. on Friday, April 7, 1967 (R.T.A. 5873).

(2) Janice Wise worked at Hof's Hut that evening, talked with KIRSCHKE. (R.T.A. 5888).

(3) Jack Ferrar was a bartender at an airport satellite bar at L.A. International Airport; on Friday, April 7, 1967 he saw Petitioner JACK KIRSCHKE "several times" between 8:30 p.m. and 11:00-11:30 p.m. at his bar, and had served him drinks. Farrar, no friend of Petitioner KIRSCHKE, saw KIRSCHKE leave the bar "around 11:00 to 11:30" p.m. on the evening of Friday, April 7, 1967.

(4) Vera Judd, (R.T.A. 5930, ff) along with a companion and her small son, saw Petitioner at L.A. International Airport between 10:15 p.m. and 11:00 p.m. when Petitioner stopped the little boy from running away, and briefly spoke to the child.

(5) Peggy Jean Peterson was a waitress at Denny's Restaurant in San Bernadino, who testified to seeing Petitioner KIRSCHKE in that restaurant between 12:30 and 2:00 a.m. on Saturday, April

8, 1967. (Petitioner had left the airport circa 11:30 p.m. and drove to San Bernardino, on his way to Las Vegas by car and had stopped at Denny's for an order of wheat toast and sausage; Miss Peterson, a total stranger and no personal friend of KIRSCHKE, verified his presence in that restaurant at a time compatible with his stated stop for food on his way to Las Vegas, Nevada.)

(6) Dennis Bailey, 19, placed Petitioner at a Yermo, California Standard Oil Gas Station, purchasing gas between 2:30 a.m. and 3:30 a.m., a time totally incompatible with Petitioner being in Naples carrying out a 2:30 a.m. ambush assassination. (R.T.A. 6132-6161).

(7) Jean Ledet, like Bailey, saw KIRSCHKE at the gas station in Yermo before 4:00 a.m. on April 8, 1967, making it impossible for Petitioner to make the Na-

ples-gas station distance between 2:30 a.m. and 4:00 a.m., and thus eliminating him as the killer. Ledet & Bailey, attendants at the gas station, were total strangers to KIRSCHKE, and owed him no allegiance.

(8) Bobby Lancaster was a bell-hop at the Stardust Hotel in Las Vegas. About 8:30 a.m. on Saturday, April 8, 1967, Lancaster checked KIRSCHKE into Room 415, receiving a dollar gambling chip from the Desert Inn Hotel as a tip. KIRSCHKE had gotten to the Desert Inn at sunrise, had gambled there, and had retained a chip which he gave to Lancaster.

It is of paramount importance that following Petitioner's arrest about 7:00 a.m. on Monday, April 10, 1967, by California Highway Patrolman Troy Richmond, near Victorville, Petitioner spontaneously related the foregoing unique alibi covering his activities from 5:00 p.m. Friday, April 7, 1967 through 7:00 a.m. on Monday, April 10, 1967. Petitioner had never seen Zimmerman, Ferrar, Judd, Peterson, Bailey, Ledet, or Lancaster at any time in his life previous to Friday evening and early Saturday morning and never saw them all day Saturday or Sunday April 9, 1967. Petitioner could never have "programmed" them to lie for him by contacting them before the killings nor could he have contacted them after the killings, for he was seen in Las Vegas periodically on Saturday and Sunday at the Rotary Convention.

Faced with this unique and detailed alibi, all of these witnesses were interviewed by the State, and eventually testified either for the prosecution or defense, verifying the alibi.

(f)

REASONS FOR GRANTING WRIT OF CERTIORARI

(1) The constitutional errors herein asserted to exist were presented first to the Supreme Court of California by a Petition for Habeas Corpus filed June, 1972;
(2) That Court transferred the Writ to the California Court of Appeals, Second Appellate District, Division 1, where the

direct appeal was then pending, with the explicit and direct order to consider the allegation of the Writ in conjunction with the Direct Appeal;

(3) The California Court of Appeals refused to do so, affirming the direct conviction but issuing an Order to Show Cause on the Writ Allegations both on July 28, 1972;

(4) At an evidentiary hearing held in March and April, 1973 the allegation of this Petition for Certiorari were proven factually.

(5) On November 1, 1973, the Superior Court denied relief solely because it found that it was not established that the testimony of policeman Wolfer was "perjured". The Superior Court found it to be "error," or the "result of a bad memory", or "ignorance". See Exhibit "B" herewith attached;

(6) On or about January 13, 1975, a renewed and enlarged Petition for Writ of Habeas Corpus was filed in the Court of Appeals, Second Appellate District, alleging each and every one of the constitutional errors herein contained in this

Petition for Certiorari;

(7) On December 2, 1975 that Court ruled in the opinion set forth as Exhibit "A", IN RE KIRSCHKE, 53 Cal. App. 3rd 405, 125 Cal. Rptr. 680 (1975);

(8) On December 29, 1975 the Court of Appeals denied a Petition for Rehearing. (Exhibit "C");

(9) On January 28, 1976, the California Supreme Court denied a Hearing. (Exhibit "D").

The foregoing is presented in satisfaction of Rule 23 (f) Rules of the Supreme Court of the United States.

(h)

ARGUMENT

I

THE CALIFORNIA COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS HONORABLE COURT IN HOLDING THAT KEY,CRITICAL, MATERIAL EVIDENCE, AFFECTING NOT ONLY THE MERITS OF A CRIMINAL CONVICTION BUT ALSO AFFECTING THE CREDIBILITY OF A KEY STATE WITNESS, WHICH IS FALSIFIED BY AGENTS OF THE STATE,

DOES NOT DENY DUE PROCESS OF LAW AND CAUSE A REVERSAL OF THE CONVICTION.

The conviction of Petitioner JACK KIRSCHKE was achieved by totally circumstantial evidence, without one iota of direct evidence being adduced to show that he killed his wife ELAINE and her companion ORVILLE W. "BILL" DRANKHAN.

In fact, direct evidence adduced by the defense in the form of Petitioner's statements as to his whereabouts at the time of the killing was verified by no less than 7 independent citizen witnesses who were total strangers to JACK KIRSCHKE. These 7 witnesses testified to Petitioner's presence at locations ranging from 40 miles to 360 miles from the murder scene at times critical in this case, and Petitioner was placed over 200 miles from the crime scene at the time of the shooting by witnesses who were total strangers to him and thus not beholding to or biased in favor of him.

Further, scientific evidence now available conclusively shows that Petitioner JACK KIRSCHKE could not have carried out the killing of his wife and her companion.

Anomalously, California state courts refused to set aside this conviction even though it was achieved by prosecution perjury, suppression of evidence, and negligent use of key, material, and false evidence going to the heart of the issues in the case; and dually affecting the credibility of its key witness, a Los Angeles police officer, DeWayne Allen Wolfer.

The following relative defense vs. prosecution time-table heralds the critical importance of the key material and false prosecution evidence:

Time \ Relative Evidence	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
5:30 p.m. Friday, April 7, 1967	None available	Kirschke leaves work, stops at bar for drink; verified by bartender.
Circa 6:00 p.m. Friday, April 7, 1967	None available	Kirschke picks up dry cleaning for wife; verified by dry cleaning shop proprietor.
Circa 7:30 p.m. - 8:00 p.m., Friday April 7, 1967	There is no dispute that Janice Wise introduced a Long Beach, California off-duty fireman, Robert Zimmerman, to Jack Kirschke at Hof's Hut Restaurant.	
Circa 8:30 p.m. Friday, April 7, 1967	The prosecution seems willing to accept that Petitioner arrived at the airport at 8:26 p.m. as evidenced by a parking ticket stub.	Kirschke arrives at Los Angeles International Airport, a few minutes too late to catch a Las Vegas flight on Bonanza Airlines.

Time \ Relative Evidence	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
Between 8:30 p.m. and 11:00 p.m. on Friday, April 7, 1967	A neighbor walked past the Kirschke home in Long Beach and saw Elaine & Bill Drankhan alive at 9:30 p.m.; a 2nd neighbor walked past the Kirschke home at 10:30 p.m. and saw Elaine, Bill Drankhan and an unidentified 3rd person alive in the Kirschke home; that 3rd person was not identified even as to sex.	Los Angeles Airport bartender, Jack Ferrar sells Petitioner Jack Kirschke drinks periodically between 8:30 p.m. - 11:00 p.m. while Kirschke awaits a plane to Las Vegas on a standby basis; verified by Jack Ferrar at trial; between 10:15 p.m. & 11:00 p.m. Vera Judd meets Jack Kirschke when this Petitioner stopped her small son from running away & returned the child to the mother; verified by Vera Judd at trial.
	NOTE BENE: It is some 40 minutes & some 35 miles from Petitioner's home in Long Beach to the Los Angeles International Airport.	

Relative Evidence / Time	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
Between 11:30 p.m., Friday, April 7, 1967 - 12:30 a.m., Saturday, April 8, 1967.	Elaine Kirschke & Bill Drankhan are seen alive, dancing & drinking at the Long Beach Yacht Club; they leave about 1:00 a.m., Saturday morning when the music ceases playing.	Petitioner Jack Kirschke leaves L.A. Int. Airport in an old Volkswagon Kharman-Ghia and drives East to San Bernardino, some 80 miles, arriving circa 12:30 a.m. at a Denny's restaurant where he stops to eat.
	NOTE BENE: San Bernardino is some 60-70 miles and over an hour by car from the murder scene.	

Relative Evidence / Time	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
Between 12:30 a.m. & 2:00 a.m. on Saturday, April 8, 1967	Elaine & Bill leave the Long Beach Yacht Club about 1:00 a.m. & repair to the Kirschke home in Long Beach; between 1:30 & 2:00 a.m. Elaine removes all of her clothes & dons a pajama top, Drankhan remains fully clothed.	Jack Kirschke is served an order of sausage, wheat toast, & coffee by Peggy Jean Peterson, a waitress at Denny's Restaurant in San Bernardino, California; verified at trial by Peggy Jean Peterson.
Between 2:00 a.m. - 2:30 a.m.	George F. Cornell & his wife, upstairs neighbors to the Kirschkes, are awakened circa 2:15 a.m. by	Kirschke departs the Denny's Restaurant in San Bernardino & drives to Yermo, California

Time \ Relative Evidence	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
Between 2:00 a.m. - 2:30 a.m. (cont'd)	arguing & noises downstairs; circa 2:30 a.m., 2 loud reports ring out, ostensibly the shooting of Elaine & Bill.	on the Interstate Highway to Las Vegas where circa 3:00 - 3:30 a.m. he stops for gas.
	NOTE BENE: It is some 2 - 2¼ hours and some 140 miles from the gas station to the crime scene.	
Between 3:00 a.m. - 4:00 a.m.	The dying bodies of Elaine & Bill are in the Kirschke home at 185 Rivo Alto Canal, Long Beach; at 4:00 a.m. a neighbor sees a light go out in the Kirschke bedroom.	Kirschke is sold gas at a Standard Oil Station at Yermo, Ca. by Jean Ledet & Dennis Bailey, station attendants, who verify his presence there at some 140 miles & 2¼ hours from the death scene.

Time \ Relative Evidence	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
4:00 a.m. - 6:30 a.m. Saturday, April 8, 1967	The dying or now dead bodies of Elaine & Bill are both lying on their back in the Kirschke home in Long Beach.	Petitioner Jack Kirschke is on the road from the Yermo, Calif. gas station to Las Vegas, where he arrives circa 6:30 a.m. & stops at the first hotel to freshen up & play the game tables.
	NOTE BENE: It is 4-1/2 hours & some 300 miles from the death scene to Las Vegas, Nevada	
6:30 a.m. - 8:00 a.m., Saturday, April 8, 1967	The dead bodies of Elaine & Bill remain on their backs in the Kirschke home in Long Beach, California.	Petitioner Kirschke plays the game tables at the Desert Inn Casino, leaving circa 8:00 a.m. keeping some chips marked with that casino's name.

Time / Relative Evidence	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
8:15 a.m. - 9:00 a.m. Saturday, April 8, 1967	At 8:30 a.m. some 6 hours have elapsed since the 2:30 a.m. shooting; if death occurred at 2:30 a.m., this is the earliest time the killer could have moved the Drankhan corpse after lividity fixation.	Petitioner is checked into the Las Vegas Stardust Hotel by Bell hop Bob Lancaster, who is tipped by Petitioner Kirschke with a chip from the Desert Inn; Lancaster verifies this at trial.
All day Saturday, April 8, 1967 & Sunday, April 9, 1967	Neighbors hear the phone ring in Kirschke flat; it is unanswered.	Petitioner Kirschke attends Rotary Convention in Las Vegas.
Sunday, April 9, 1967 circa 7:30 - 8:00 p.m.	George Cornell & his son-in-law discover the bodies of Elaine & Bill & call the Long Beach police.	Kirschke is in Las Vegas, Nevada; he leaves circa 3:00 a.m. Monday, April 10, 1967 to drive back to Los Angeles

Time / Relative Evidence	Prosecution Evidence	Defense Evidence Verified by Independent Witnesses
Monday, April 10, 1967 circa 7:00 a.m.	An A.P.B. was put out for Petitioner's arrest some time before 7:00 a.m.; between 8:30 a.m. on Sat. & 3:00 a.m. on Mon., Petitioner was continuously in Las Vegas, as verified by a host of Rotary Convention attendees.	Petitioner is arrested by California Highway Patrolman Troy Richmond near Victorville, California; Petitioner spontaneously narrates the foregoing entire sequence of his whereabouts since 5:00 p.m. on Friday, April 7, 1967, the details of which were verified by total strangers called as witnesses.

The foregoing table clearly shows that Petitioner defended with an alibi of unique nature which was verified by at least 7 witnesses without a scintilla of bias in favor of Petitioner.

The alibi conclusively showed that Petitioner could not have carried out the killing of his wife and Drankhan because of the following:

(R.T.A. = Reporter's Transcript on Appeal)

1. The dead body of Orville "Bill" Drankhan exhibited fixed, permanent post-mortem lividity in its posterior; it was found on its stomach conclusively establishing that it had been moved at least 6-8-12 hours after death, at a time that Petitioner Kirschke could not have been on the death scene.

2. Petitioner Kirschke was established to be in Las Vegas, Nevada at 8:30 a.m. on Saturday, April 8, 1967, having driven there by automobile.

3. Prosecution evidence established a minimum driving time of 4-1/2 hours, conclusively establishing that Kirschke must have left the death scene at the latest at 4:00 a.m.

4. The shooting occurred at 2:30 a.m., but 1-1/2 hours elapsed from 2:30 -4:00 a.m., a scientifically insufficient time for lividity to permanently fix in the posterior of the Drankhan corpse. How then could Kirschke move the body before he departed at 4:00 a.m.?

5. Scientifically a human being must have moved the body and it could not have been Kirschke but must have been the true killer. Someone not the killer inadvertently entering the home and discovering the body would not move it but would logically call the police and report the killing. No such evidence exists to show the presence of some 3rd party or Kirschke.

6. The only way the prosecution could explain the movement of the dead body at a time that Petitioner Kirschke was in Las Vegas was by a "phenomenon", which they did via a falsely qualified, falsely represented Los Angeles police officer, DeWayne Allen Wolfer.

Wolfer was called to the stand by the prosecutor and was asked a series of questions to which he gave false answers, wilfully perjuring himself on his edu-

cational background and thus falsely enhancing his credibility. Moreover, he gave false scientific evidence going to the merits of the case in that he "explained" that the dead body moved because of "fluid shifts" of "all of the body fluids", due to cell wall disintegration allowing "all" of the inter/intra-cellular fluid to migrate to a "new center of gravity", causing the body to move.

Such evidence was either wilfully, negligently or inadvertenly false and went to the key issue in the case of explaining how the dead body moved, and thus enabled the prosecutor to argue to the jury that Petitioner's well-documented and verified alibi was false, and it did not matter that Petitioner had established his presence in Las Vegas when the body was moved--for "the body moved itself"!!!

7. Wolfer suppressed the truth of his educational background, wilfully substituting false and much more qualified educational credentials, as he testified under oath. This is an express violation of the mandates of this Honorable Court

in Brady v. Maryland 373 U.S. 83, 87.

It would, of course, have been favorable to Petitioner had Wolfer admitted his lack of qualifications and it was obviously harmful to Petitioner to have him substitute false credentials in place of the suppressed true facts.

We follow with the applicable Federal and State law developed by this Court and the Supreme Court of California which governs the wilful, negligent, or inadvertent use of false, material, and key prosecution evidence.

This exact material was presented to the state courts of California and we represent it here:

THE APPLICABLE LAW

I

"...The jury's estimate of the truthfulness and reliability of a given witness may well be determineative of guilt or innocence..."

Napue v. Illinois 360 U.S. 264, 269, 3 L.Ed. 2d 1217, 79 S.Ct. 1173; People v. Ruthford, 14 Cal. 3rd 399, 407.

We are here focusing attention on the key prosecution witness, state representative policeman De Wayne Allen

Wolfer, who has been adjudicated at both the Superior Court and Court of Appeals level to have presented "negligently false" evidence, evidence "bordering on perjury", or evidence at least given "with a reckless disregard for the truth".

II

When the defense team requests evidence under oath from a state representative witness at a criminal trial, which would be favorable to the accused if truthfully presented, the suppression of the truth with a substitution of harmful and false evidence in its place is a denial of due process of law, when that evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland, 373 U.S. 83, 87, 10 L.Ed. 2d 215, 83 S.Ct. 1194.

In Brady, the High Court said:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md, at 427."

III

Under California law, it does not make any difference whether the material evidence that is suppressed is done so wilfully, negligently, or inadvertently when it is done by a state agent representative who is testifying on a material

point on an issue of materiality; if the suppressed evidence affects directly the question of guilt, the degree or amount of prejudice is not to be weighed or measured by the federal harmless error rule of Chapman v. California, 386 U.S. 18, 24, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 1065; if the suppressed evidence affects directly the question of guilt, the sole question is materiality, and if found material, the judgment of conviction must be reversed.

In People v. Ruthford, 14 Cal. 3rd 399, 406, Chief Justice Wright, speaking for a unanimous Court, said:

"We note, preliminarily, that when the evidence which is suppressed or otherwise made unavailable to the defense by conduct attributable to the state bears directly on the question of guilt our initial inquiry is whether such conduct resulted in denial of a fair trial. If so, the judgment of conviction must be reversed without weighing the degree of the prejudice to the accused. (Pyle v. Kansas (1942) 317 U.S. 213, 216 [87 L.Ed. 214, 216, 63 S.Ct. 177]; People v. Kiihoa, supra, 53 Cal. 2d 748, 754; see also In Re Imbler (1963) 60 Cal. 2d 554, 567, [35 Cal. Rptr. 293, 387 P. 2d 6], wherein we stated: 'Moreover, suppression by the state of material evidence alone deprives a defendant of due process of law.') It

is necessary in such circumstances, of course, that the materiality of the evidence suppressed or otherwise not disclosed be examined in order that we may judge whether an accused has been fairly tried, but that examination is one which goes to the question of the evidence rather than prejudice to the accused."

In the case at bar, DeWayne Allen Wolfer suppressed from the defense the following matters which went directly to the merits of the case in that Wolfer's testimony assertedly "destroyed KIRSCHKE'S alibi" and "explained" how the dead body of Orville Drankhan rolled from its death bed several hours after it had died and KIRSCHKE had allegedly departed from the murder scene:

(1) Wolfer suppressed the fact that he did not even understand the meaning of the concept of "center of gravity," when he presented key and false scientific evidence to explain how the "center of gravity" shifted because of so-called "fluid shifts" in the dead body. In a subsequent deposition in a Civil Case he admitted that he did not know

how to define it, and under oath at the evidentiary hearing held in March and April, 1973, Wolfer admitted under oath not knowing how to calculate it. This was false testimony given at trial in aid of his demonstration how the dead body moved, directly affecting the guilt determination process.

(2) Wolfer suppressed the fact that his "fluid shift" testimony was based upon his fantasizing over what he thought might be happening in a dead human body upon death, based upon his looking at corpses at homicide scenes and at morgues, and instead of presenting the truth he substituted the false evidence that his expertise was obtained by his study of all types of anatomy and physiology courses at the University of Southern California. The truth was admitted at the March & April, 1973 evidentiary hearing; the key

false evidence was presented at trial.

(3) Wolfer suppressed at trial the fact that he did not even know nor understand the meaning of the acoustic term "decibel" when he purported to explain the silencing of a hand gun by either a towel or a Briggs & Stratton lawn mower engine muffler. This key false evidence has been adjudicated to be "negligently false" by the December 2, 1975 opinion of the Court of Appeals.

The key acoustics testimony and the key center of gravity and anatomy and post-mortem "fluid shift" testimony went directly to the merits of the case on material points in the area of prosecution countering of the key defense alibi, and hence, bore, at trial, directly on the issue of guilt, and thus is not subject to application of any harmless error rule.

"...The judgment of conviction must be reversed without weighing the degree of prejudice to the accused..." Ruthford, 14 Cal. 3rd 399, 406-407.

IV

If the suppressed evidence bears only on the credibility, the Federal Harmless Error Rule of Chapman v. California 386 U.S. 18, 24 is to be applied; however, where, as here, the suppressed evidence is a suppression of the truth about educational credentials and qualifications, with a substitution of false and more qualified achievements, it has already been determined that a suppression of material evidence affects the credibility of a state representative witness, and that it "might affect the judgment of the trier of fact", and hence the outcome of the trial.

In People v. Ruthford, 14 Cal. 3rd, 399, 407, the California Supreme Court said:

"As in the case of the suppression of evidence which bears directly on the question of an accused's guilt, the suppression of material evidence bearing on the question of the credibility of the key witness for the prosecution has also been the case in language of denial of a fair trial. ..."

This court went on to say:

"We conclude that the suppression of

substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment. Although the denial is not one attributable to error by the court we nevertheless judge its prejudicial effect and whether defendant is entitled to relief therefrom in the same manner as in the case of federal constitutional denials resulting from error by the court. An accused, accordingly, is entitled to relief in such circumstances unless we can declare a belief that the denial "was harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R. 3d 1065].) We read the language of Napue and Giglio as not placing a heavier burden on the state than that imposed by Chapman, and we elect in the interest of an evenhanded application of the law to follow the Chapman rule when confronted with all denials of federal constitutional dimensions even if Napue and Giglio propose a less stringent rule..."

However, it is well conceded that Wolfer played the key role in "destroying the alibi" of KIRSCHKE by his false key scientific evidence and surely his credibility thus was in issue.

As the California Supreme Court said in IN RE IMBLER, 60 Cal. 2d 554, 564-565, Fn. 2:

"As to Costello's trial testimony re-

garding his college education, the referee found 'that the foregoing false testimony does not constitute perjury as defined by the Penal Code of the State of California (§ 118, 125) in that said testimony was not given as to any fact material to the essential issues involved in the trial of Petitioner Imbler.' (No finding was made as to Costello's trial testimony regarding the number of his felony convictions.) False testimony concerning the credibility of a witness is material, however, and may the basis of a conviction for perjury. (People v. Barry, supra; People v. Lem You supra; People v. Low Ying, supra.) Arguably, Costello's educational achievements are technically immaterial to show rehabilitation from insanity, but in a perjury case, "the ordinary test of materiality is whether the testimony given could have probably influenced the tribunal before which the cause was being tried. ..." (People v. Barry, 153 Cal.App. 2d 193, 209 [314 P.2d 531]; accord People v. Di Giacomo, 193 Cal.App.2d 688, 699-700 [14 Cal.Rptr. 574]; People v. Macken, 32 Cal.App. 2d 31, 41 [89 P.2d 173]; People v. Dunstan, 59 Cal.App.574, 584 [211 P. 813].) This testimony 'could have probably influenced' the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination."

The falsification of educational credentials have surely placed Wolfer in a more prestigious elevation in the eyes of the jury, hence, enhanced his credibility,

and "could have probably influenced" the jury to believe him over the key defense witnesses, Gerald K. Ridge, M.D., LeMoyne Snyder, M.D., and William Harper, all of whom said that the body could not move from the bed unaided by human forces.

This block of testimony went to the key alibi area of the case, hence to the issue of guilt determination, as well as to the general overall credibility of policeman Wolfer.

Because of People v. Ruthford's equating of wilful with inadvertent with negligent suppression of key evidence, the following analysis from IN RE IMBLER, 60 C.2d 554, 564-565 is here applicable:

"Fasle testimony affecting a witness's credibility is perjured if wilfully given (People v. Barry, 63 Cal. 62, 64-65; People v. Lem You Ying, 20 Cal.App. 2d 39, 42-43 [66 P.2d 211], and such testimony would require that the conviction be overturned if representatives of the state had knowledge of its false nature and if it might have affected the outcome of the trial (see Napue v. Illinois, 360 U.S. 264, 269-270 [79 S.Ct. 1173, 3 L.Ed. 2d 1217]; People v. Savvides, 1 N. Y. 2d 554, 557 [154 N.Y.S. 2d 885, 135 N.E. 2d 853]). [[6b]] Petitioner, however, failed to prove knowledge of these

falsehoods by representatives of the state. No evidence was introduced at the reference hearing to show that any person connected with the prosecution knew of Costello's educational background. ..."

In the case at bar, the false testimony affecting Wolfer's credibility was "bordering on perjury" or was given "with a reckless disregard of the truth," but it matters little under Ruthford, supra. It was given by a state agent, and under fn. 2 at 60 C. 2d 554, 564-565, it might have affected the outcome of the trial.

In California, the state must affirmatively divulge favorable evidence to the defense. As the Supreme Court said in IN RE FERGUSON, 5 C. 3rd 525, 531:

"The search for truth is not served but hindered by the concealmnent of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. (3) Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal.
(4) Implementation of this policy requires recognition of a duty on the part of the prosecution to disclose evidence to the defense in appropriate cases.
(5) It is settled that the intentional suppression of material evidence upon

request denies the defendant a fair trial. (Brady v. Maryland, 373 U.S. 83, 87 [10 L.Ed. 2d 215, 218-219, 83 S.Ct. 1194]; In Re Lessard, 62 Cal. 2d 497, 508 [42 Cal. Rptr. 583, 399 P.2d 39]; In Re Imbler, 60 Cal. 2d 554, 567-570 [35 Cal.Rptr. 293, 387 P.2d 6]; People v. Kiihoa, supra, 53 Cal. 2d 748, 752; In Re Razutis, 35 Cal. 2d 532, 535 [219 P.2d 15]; McCullar v. Superior Court, 264 Cal.App. 2d 1, 7[70 Rptr.21].) The good or bad faith of the prosecutor is not determinative. Brady v. Maryland, supra, 373 U.S. 83, 87.)..."

Where, as here, there was ample defense "which might have caused a different verdict," the materiality of Wolfer's false evidence going to the merits of the case as well as to his credibility cannot be doubted.

Moreover, learning of Wolfer's falsification of his qualifications in the key medical anatomy area could well have led to an exposure of his falsification of the key ballistics evidence.

IN RE FERGUSON, 5 Cal. 3rd 525, 533 speaks to both of the above:

"In considering the materiality of the evidence, we must look to the entire record because materiality can only be determined in the light of the circumstances. Thus we must consider not only the other evidence of guilt but also any

other defense evidence which might have caused a different verdict. In addition, where, as here, it is apparant that the disclosure of the evidence concealed would have logically led to other evidence, such other evidence which has been found since the trial must also be considered. The basis of the rule requiring disclosure by the prosecution, as we have seen, is that the defendant may otherwise be deprived of a fair trial, and thus we must consider all of the matters bearing on the ultimate question of the fairness of the trial."

Hence, the falsification of the key ballistics evidence is reachable by collateral attack as is made evident by Ferguson, supra.

THE APPLICABLE AND GOVERNING LAW ENUNCIATED UNDER THE SUPERVISORY ROLE OF THIS HONORABLE COURT OVER THE LOWER FEDERAL COURTS CONCERNING FALSE AND MATERIAL EVIDENCE SHOULD NOW BE MADE A MATTER OF FEDERAL DUE PROCESS OF DUE, BINDING ON THE STATES.

In Mesarosh v. United States, the United States Supreme Court vacated a Federal criminal conviction because false governmental evidence was used at the trial on a material point, without worrying about what may have caused that false

evidence. 352 U.S. 1, 1 L.Ed. 2d 1 77 S.Ct. 1.

In Mesarosh, a debate centered over whether certain false testimony was the result of perjury or was the result of the witness being a lunatic.

Clearly seeing that the result was the same to the criminal defendant irrespective of whether the key, material false evidence was caused by perjury or was the result of a mental illness, the High Court of the United States reversed the conviction. Some of its reasoning is appropos of the case at bar: (352 U.S. 1, 9):

"Either this Court or the District Court should accept the statements of the Solicitor General as indicating the unreliability of this Government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted tesimony. This conviction is tainted, and

there can be no other just result than to accord petitioners a new trial."

On harmless error aspects of perjury or false evidence going to a material point, the High Court said: (352 U.S. 10):

"...Here, on the other hand, in a criminal case, the original finder of fact was a jury. The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case..."

In disposing by reversing the conviction, the High Court said:

"Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. ...Pollution having taken place here, the condition should be remedied at the earliest opportunity. ...The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. ..."

We note that this Honorable Court in Mesarosh v. United States, 352 U.S. 1, reversed the conviction no matter what was the cause of the false and material testimony.

We urge this court to require this

as a matter of due process of law, binding on the state courts.

Under Townsend v. Sain, 372 U.S. 293, 316, this Honorable Court is required to examine carefully de novo the state record "where the fundamental liberties of the person are claimed to have been infringed".

This Court said at 372 U.S. 213, 316:

"This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. Fiske v. Kansas, 274, U.S. 380, 385, 71 L.Ed. 1108, 1110, 47 S.Ct. 199, 208, 209, 4 L.Ed. 2d 242, 249, 80 S.Ct. 274. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See e.g. Blackburn v. Alabama (US) supra; Moore v. Michigan, 355 U.S. 155, 2 L.Ed. 167, 78 S.Ct. 191. The duty of the Federal District Court on habeas is no less exacting."

We assert that the California Court of Appeals has not correctly recognized and evaluated the consequences of the false testimony propounded by Los Angeles police officer DeWayne Allen Wolfer. The state court factual determinations and the legal and constitutional consequen-

ces flowing therefrom are simply not supported by the state trial and reference hearing transcripts.

In Appendix "E" we set forth excerpts from the final argument of the prosecutor showing what the prosecutor believed were the consequences of the testimony of Los Angeles policeman DeWayne Allen Wolfer.

It is clear that the prosecutor contended that "...when DeWayne Wolfer is through testifying I don't think anybody in this courtroom believed somebody hung around that house for 2 hours in order to throw Bill Drankhan off the bed..." (R.T.A. 9423-9424)

We refer this Honorable Court to Appendix "E" of this Petition to be convinced just how permeating the false Wolfer testimony became and how virulent its effect became on the jury because of the prosecutor's argument.

II

IN VIEW OF THE NOW DEMONSTRATED KEY FALSE STATE EVIDENCE INTRODUCED AT TRIAL, AND IN VIEW OF THE ABSENCE OF PROBATIVE DIRECT EVIDENCE AT TRIAL IN ANY EVENT,

BECAUSE OF THE DEMONSTRATED ERRORS OF SCIENTIFIC FACT THE CONVICTION OF THIS PETITIONER CAN NO LONGER BE SAID TO BE BASED ON EVIDENCE THAT CONVINCES BEYOND A REASONABLE DOUBT WITHIN THE MEANING OF IN RE WINSHIP, 397 U.S. 358 AND MULLANEY V. WILBUR, 421 U.S. 684.

In conjunction with the combined mandates of Townsend v. Sain, 372 U.S. 293, requiring this Honorable Court to scrutinize the state record with diligence (372 U.S. 293, 316), and in accord with In Re Winship, 397 U.S. 358, we assert that an examination by this Honorable Court at the present time would convince that little evidence exists in this case whatsoever to indicate that Petitioner committed the killings.

Initially, no direct evidence ever existed.

Secondly, what direct evidence was presented indicated Petitioner to be several hundred miles from the crime scene at the time of the killings and at the time the killer moved the corpse of Drankhan.

Thirdly, the prosecution was able to achieve the conviction with perjured or false material evidence itself a denial of due process of law.

Fourthly, the prosecution achieved its conviction by falsely presenting a falsely qualified policeman representing him to be an expert in science, human anatomy, physiology, physics, acoustics and other related areas; in fact, he was unqualified in all of them, but falsified his credentials in order to testify.

Fifthly, the California courts now recognize this false evidence and admit its falseness, leaving as a sole issue whether this false evidence went to a material issue in this case.

We assert that the unbiased mind studying this record must conclude that Los Angeles policeman Wolfer:

(a) was a key material witness;

(b) was a person whose credibility at trial was a key, material issue;

(c) was a key witness who presented false key evidence going to the merits of the guilt-innocence determination process;

(d) was a state called witness whose false evidence and perjury directly falls on the shoulders of the prosecution whether the prosecutor personally knew of the false evidence or whether he did not.

California Appellate law has an interesting bifurcated line of reasoning which is calculated to deny due process to a criminal defendant. When a criminal defendant discovers false prosecution evidence and brings it to the attention of the court by a Writ of Habeas Corpus filed while the direct appeal is still viable, the Court of Appeals wilfully ignores the writ although commanded to so consider it in conjunction with the direct appeal. The Court of Appeals then affirms the direct appeal conviction failing to evaluate the consequences of the errors set forth in the Writ on the Direct Appeal.

In the opinion resolving the Writ, the Court then states: (125 Cal.Rptr. 680, 687, 53 Cal. App. 3rd 405):

"The remainder of Kirschke's petition seeks further review of issues decided adversely to him on appeal or which could have been, but were not, included in the

Appeal. Those issues are not available on collateral attack. In Re Shipp, 62 Cal. 2d 547, 552, 43 Cal. Rptr. 3, P. 2d 571."

The California Court of Appeals can take credit itself, fully and completely, for bifurcation of the issues of this case when it wilfully disobeyed the command of the State Supreme Court to consider the allegations of the Writ in conjunction with the direct appeal.

Under Townsend v. Sain, 372 U.S. 293, 316, this Court must now consider integrally these errors. Townsend provides:

"This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. Fiske v. Kansas, 274 US 380, 385, 71 L.Ed. 1108, 1110, 47 S.Ct. 655; Blackburn v. Alabama, 361 US 199, 208, 209, 4 L.Ed. 2d 242, 249, 80 S.Ct. 274. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See, e.g., Blackburn v. Alabama (US) supra; Moore v. Michigan, 355 US 155, 2 L.Ed. 2d 167, 78 S.Ct. 191. The duty of the Federal District Court on habeas is no less exacting.."

In Re Winship, 397 U.S. 358, 364 provides:

"Moreover, use of the reasonable

doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

We assert that the conviction of this Petitioner is not based on competent evidence that convinces beyond a reasonable doubt, and that standard must apply de novo to state post appellate Writs of Habeas Corpus as a matter of due process of law.

We thus present for due process analysis whether the "guilt beyond a reasonable doubt" standard must be applied, de novo, to state post appellate processes.

Townsend v. Sain, 372 U.S. 293, 316;

In Re Winship, 397 U.S. 358, 364, and Mullaney v. Wilbur, 421 U.S. 684 convinces that this Honorable Court must de novo examine the instant record to ascertain whether there is any substantial evidence to convince the neutral mind in support of the conviction of this Petitioner beyond a reasonable doubt.

We pray that Certiorari be granted to resolve the serious constitutional issues presented herein.

Respectfully submitted,

ROGER S. HANSON,

GRIFFITH D. THOMAS,

GEORGE T. DAVIS

Attorneys for Petitioner,
JACK KIRSCHKE

APPENDIX A

IN RE KIRSCHKE

53 Cal. App. 3rd 405, 125 Cal.Rptr. 680

(Dec. 2, 1975)

STATE OF CALIFORNIA
COURT OF APPEALS, SECOND DISTRICT
DIVISION 1

In Re JACK KIRSCHKE
on Habeas Corpus

The PEOPLE,
Plaintiff & Respondent

v.

JACK KIRSCHKE,
Defendant & Appellant

APPEARANCES

Roger S. Hanson, Woodland Hills, Calif.
Griffith D. Thomas, Sherman Oaks, Cal.
George T. Davis, San Francisco, Cal.
Attorneys for the Appellant

Evelle J. Younger, Attorney General
Jack R. Winkler, Chief Asst. Attorney General
Edward P. O'Brien, Asst. Attorney General
Clifford K. Thompson, Jr., Deputy Attorney General
Attorneys for the Plaintiff

THOMPSON, Associate Justice.

"A jury found petitioner Jack Kirschke guilty of two counts of murder for the killing of his wife and her lover and found the murder to be of the first degree. We affirmed the resulting judgment of conviction in an unpublished opinion (Criminal No. 16044) and the judgment became final upon denial of Kirschke's petition for hearing to the Supreme Court. In these collateral attacks upon the judgment, Kirschke asserts that it should be vacated for error of constitutional dimension which denied him a fair trial. He contends:

(1) the conviction is the product of false testimony of DeWayne A. Wolfer, a criminalist employed by the Los Angeles Police Department, who, at trial, supplied damaging expert testimony on ballistics, acoustics, and anatomy;

(2) Kirschke was ineffectively represented by trial counsel;

(3) newly discovered evidence refutes prosecution evidence at trial which

undermined Kirschke's attempt to establish an alibi and otherwise points to his innocence;

(4) various issues decided against him on appeal were wrongly decided; and

(5) various other issues which could have been raised on appeal, but which were not, compel vacation of the judgment.

We conclude that while Wolfer negligently presented false demonstrative evidence in support of his ballistics testimony, Kirschke had ample opportunity to rebut the demonstrative evidence at trial so that the negligently false evidence is not a basis for collateral attack. (In Re Manchester, 33 Cal.2d 740, 742, 204 P.2d 881; In Re Waltreus, 62 Cal.2d 218, 221, 42 Cal.Rptr. 9, 397 P.2d 1001, cert. den. 382 U.S. 853, 86 S.Ct. 103, 15 L.Ed.2d 92.) We conclude further that while Wolfer's acoustical testimony was false and while his testimony on qualifications as an expert on anatomy was also false and borders on the perjurious, the opinion evidence given by Wolfer dealing with acoustics and anat-

omy pertained to essentially irrelevant matter and beyond a reasonable doubt could not have affected the outcome of the trial. Finally, we conclude there is no showing of ineffectiveness of trial counsel as a demonstrable reality (People v. Reeves, 64 Cal.2d 766, 774, 51 Cal.Rptr. 691, 415 P.2d 35), that Kirschke has not shown any newly discovered evidence, and thathe is barred from raising on collateral attack issues that were decided or could, if raised, have been decided on appeal. (In Re Shipp, 62 Cal.2d 547,552, 43 Cal.Rptr.3, 399, P.2d 571, cert. den. 382 U.S. 1012, 86 S.Ct. 623, 15 L.Ed.2d 528.) Accordingly, we deny the relief sought by petitioner.

TESTIMONY AT TRIAL

In essence, the evidence at trial established Kirschke's motive and opportunity to kill. The victims were Kirschke's wife and her lover, killed on the Kirschke bed while apparently engaged in sexual activity. Kirschke had shown great, although private, resentment at the notorious nature of his

wife's affair because of its potential to frustrate his efforts to secure a judicial appointment from a newly elected governor whom he had vigorously supported. An exculpatory statement of Kirschke to investigators of the crime in which he attempted to establish an alibi was proved false. Kirschke attempted to show his presence at the Los Angeles airport at a critical time by oral reference to a parking receipt containing a time stamp. Investigation showed that the receipt could not have been issued at the time stated by Kirschke.

The circumstantial weight of motive and opportunity was buttressed by evidence of the murder weapon. The victims were killed by shots for a .38 caliber gun. A revolver of that caliber had been released to Kirschke after he, as a deputy district attorney, had successfully prosecuted a defendant who had used it in a crime. Kirschke admitted that the revolver was kept loaded in a bed table next to the murder bed. While the revolver was missing after the murder and was never found, cash and other small items

of considerable value in plain sight in the bedroom remained after the killings. A statement by Kirschke to his secretary after the murders indicated his desire to suppress evidence that the revolver existed.

The .38 caliber revolver released to Kirschke had, in the past, been subjected to ballistic examination and test bullets had been fired from it. DeWayne Wolfer, a criminalist employed by the Los Angeles Police Department having qualified as an expert in ballistics, expressed his opinion that the earlier test bullets so matched the murder slugs that the .38 caliber revolver and no other in the world was the murder weapon. Wolfer illustrated his opinion by enlarged photographs of the test and murder bullets. While Kirschke had employed his own ballistics expert who examined the test and murder bullets at length and who was present at counsel table while Wolfer was questioned on direct and cross-examination, no question was raised by Kirschke at trial concerning the validity of the

photographs. The defense expert on ballistics did not testify.

A sideshow developed at trial. Postmortem lividity on the body of the male victim indicated that his body had rested on its back on the bed for at least two hours after death, while the body was discovered face down on the floor beside the bed. Bloodstains on a wall indicated that the body had rolled from the bed. The defense hypothesized that the killer had moved the body after death at a time which tended to support Kirschk's alibi although by no means to establish it. To counter the hypothesis, the prosecutor recalled Wolfer, this time qualifying him as an expert in anatomy and acoustics as well as ballistics.

Wolfer's acoustical testimony theorized that the murder weapon may have been silenced with a towel or a lawn mower muffler in a fashion which would have prevented its discharge from being heard so that witness reports of loud noises in the early morning hours may have referred to the falling body rather than gunshots.

Wolfer qualified as an expert on anatomy by reference to his university education. He testified that, as an undergraduate, he had taken a course in human anatomy in which he and another student had dissected a cadaver from top to bottom. Having qualified as an expert, Wolfer expressed his opinion that a shift of body fluids after death could have so altered the center of gravity of the body as to cause it to roll from the bed. To emphasize its theory, and undoubtedly to present a dramatic conclusion to its case, the prosecution conducted an in-court demonstration of the Wolfer theory. The murder bed, round in shape, was brought into the courtroom and placed before the jury. A male and female police officer acted the part of the victims of the crime while the path of the murder bullets was traced. The male officer then rolled from his back on the bed, landing face downwards beside it.

A jury found Kirschke guilty of two counts of first degree murder. On appeal from the judgment based upon the

verdict, we concluded that the prosecution's demonstration was questionable rebuttal but that error, if any, inherent in it was harmless. We considered and rejected 17 other contentions of error and affirmed the conviction.

HEARING ON ORDER TO SHOW CAUSE

Concurrently with his appeal to this court, Kirschke filed a petition for habeas corpus and coram vobis with the Supreme Court. The high court transferred the petition to us and we issued an order to show cause returnable in the Los Angeles Superior Court where the case had been tried. Judge George Dell of that court conducted an extensive evidentiary hearing on the petition and denied the petition.

Pursuant to In Re Hochberg, 2 Cal.3d 870, 873-874 fn. 2, 87 Cal.Rptr. 681, 471 P.2d 1, we have made our independent examination and appraisal of the evidence taken in the superior court. That independent examination and appraisal leads us to the same factual conclusions drawn by Judge Dell.

Evidence produced at the hearing on the order to show cause established that the enlarged photographs of the test and murder bullets used by Wolfer to demonstrate his opinion that the bullets were fired from the same gun do not do so. The evidence convinces, however, that the error is not deliberate. Wolfer compared the bullets under a microscope, reaching his conclusion of identity of weapon. He interrupted his work and returned later to take the photographs. The error is established as due to the interruption.

Court appointed firearms experts, testifying at the order to show cause, were of the opinion that the .38 caliber revolver released to Kirschke may have been the murder weapon. They were not able to make a positive identification because "fine identifying individual characteristics which are apparent in (the) photographs are now obscured or removed by what appears to be a combination of oxidation and wear.

Evidence on Wolfer's educational

qualifications in anatomy, resting upon his dissection of a cadaver, is conflicting. While Wolfer's "memory may not be correct", the evidence does not establish that he "actually lied about his dissection experience." "It is manifest that Wolfer knew very little about what he was talking about when he explained the shifting of 'body fluids' and undertook to explain the quantum of sound reduction that could be achieved by use of a silencer on a handgun." The evidence, however, falls short of establishing that Wolfer actually lied in expressing his anatomical and acoustical opinion.

The evidence on the order to show cause does not demonstrate that Kirschke's trial counsel was ineffective. Kirschke argued the ineffectiveness from his counsel's asserted failure to have his own examination of the death and test bullets. He did not, however, call trial counsel as witness.

BALLISTICS TESTIMONY

Kirschke argues that the demonstrative evidence in the form of the enlarged photographs of the test and murder bullets is perjurious, requiring that the judgment be overturned. He argues alternatively that if the error in the evidence is negligent or inadvertent rather than perjurious, the judgment must nevertheless be vacated because the negligent or inadvertent use of demonstrative evidence prepared by an agent of the state is the equivalent of the suppression of evidence favorable to the accused within the meaning of People v. Ruthford, 14 Cal.3d 399, 121 Cal.Rptr. 261, 534 P.2d 1341, and In Re Ferguson, 5 Cal. 3d 525, 96 Cal.Rptr. 594, 487 P.2d 1234.

"A judment of conviction based on testimony known by representatives of the state to be perjured deprives the defendant of due process of law....and may be attacked on habeas corpus.... In making such an attack, however, (the) petitioner must establish by a preponderence of the evidence that perjured

testimony was adduced at his trial..." (In Re Imbler, 60 Cal.2d 554, 560, 35 Cal.Rptr. 293, 296, 387 P.2d 6, 8, cert. den. 379 U.S. 908, 85 S.Ct. 196, 13 L.Ed. 2d 181.) "An honest error in expert opinion is not perjury even though further diligence and study might have revealed the error." (In Re Imbler, supra 60 Cal.2d at p. 567, 35 Cal.Rptr. at 300, 387 P.2d at 12.) Here Kirschke failed to establish by a preponderance of the evidence that Wolfer's error in preparation of the enlarged photographs was anything other than an honest mistake.

(1) Negligent presentation of false prosecution evidence is also a basis for habeas corpus, but only if it results in a denial of a fair trial. "Unless (the) negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack." (In Re Imbler, supra 60 Cal.2d at p. 567, 35 Cal.Rptr. at p. 300, 387 P.2d at 13; see also In Re Manchester, supra, 33 Cal.2d 740, 742 204 P.2d 881; In Re Waltreus, supra, 62

Cal. 2d 218, 221, 42CalRptr. 9, 397 P.2d 1001). Here the negligence of Wolfer in the preparation of the demonstrative evidence did not obstruct Kirschke's ability to challenge the case against him. The test and murder bullets were available to Kirschke and his expert throughout the trial and were previously made available on a discovery motion. (See In Re Imbler, supra, 60 Cal.2d at p.567, 35 Cal.Rptr. 293, 387 P.2d 6.) For reasons of his own, Kirschke's trial counsel did not elect to call the defense ballistics expert as a witness.

(2) Kirschke argues that the rule of Imbler and related cases has been impliedly overturned by In Re Ferguson, supra, 5 Cal.3d 525, 96 Ca.Rptr. 594, 487 P.2d 1234, and People v. Ruthford, supra, 14 Cal.3d 399, 121 Ca.Rptr. 261 534 P.2d 1341, holding that the suppression by the prosecution of evidence favorable to the accused may deny due process of law whether the failure to to disclose the evidence is deliberate negligent, or inadvertent. Ferguson

and Ruthford are not inconsistent with Imbler. Suppression of evidence favorable to a defendant of necessity obstructs the ability of the defense to challenge the prosecution's case. Negligently erroneous testimony of a state agent does not obstruct the defendant's ability to defend where, by discovery or otherwise, he is afforded the means to establish the error in the testimony.

(3) We thus conclude that Wolfer's negligent error in preparing the enlarged photographs used to buttress his opinion testimony does not support Kirschke's collateral attack upon the judgment against him.

ACOUSTICS & ANATOMICAL TESTIMONY

Kirschke attacks Wolfer's testimony on the acoustics of silencers as perjuriously or negligently false and mounts the same offense against Wolfer's opinion of change in a dead body's center of gravity based upon postmortem fluid shift plus Wolfer's testimony on his qualifications to give the opinion.

(4,5) Unquestionably, Wolfer's opinion testimony on acoustics and anatomy was negligently false. His testimony of his educational qualifications borders on perjury and is, at least, given with a reckless disregard for the truth. False, or even perjurious, prosecution testimony is an adequate ground for collateral attack, however, only when it "may have affected the outcome of the trial." (In Re Imbler, supra 60 Cal.2d 554, 560, 35 Cal.Rptr. 293, 296, 387 P.2d 6,8.) Here the acoustical and anatomical testimony could not, beyond a reasonable doubt, have affected the outcome of the trial so that it does not support Kirschke's collateral attack upon the judgment. (See People v. Ruthford, supra, 14 Cal. 3d 399, 408, 121 Cal.Rptr. 594, 487 P.2d 1234). The testimony did not concern the heart of the matter. The prosecution's very strong although circumstantial case was made when it established Kirschke's motive, his resentment of the notoriety of his wife's affair, his opportunity , his false alibi, and his possession of the murder weapon. The

Wolfer testimony on acoustics and anatomy merely exemplifies prosecution tactical error in overtrying a good case by means not adding to its strength. As indicated in our opinion on appeal (Criminal No. 16044), Kirschke's alibi is far from established if the sounds heard early in the morning hours surrounding the murder are treated as gunshots. The manner in which the body of the male victim fell from the bed after two hours rest upon it similarly adds or detracts nothing from the case. At most, it is an unexplained phenomenon which is virtually irrelevant to Kirschke's guilt or innocence.

NEWLY DISCOVERED EVIDENCE

In support of the coram vobis aspects of his petition, Kirschke asserts that newly discovered evidence compels vacation of the judgment against him. As best we can distill the 142-page petition, the "newly discovered evidence" asserted by Kirschke is:

(1) evidence that Wolfer falsified his educational background;

(2) evidence that the ballistic photographs are erroneous;

(3) evidence obtained in a deposition in an unrelated case that Wolfer is "fully and absolutely ignorant of literally dozens of basic terms and principles in the fields of mechanics, physics, acoustics, and mathematics" and is unable to compute a center of gravity; and

(4) Kirschke's own testimony at a State Bar hearing in which he attempted to rehabilitate his alibi by stating that he then remembered that he had parked in a different lot at the Los Angeles airport so that the evidence which destroyed his alibi is no longer pertinent.[1.]

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1. Inferentially by a footnote in a document entitled. "Traverse to Response-Supplemental Points and Authorities in Support of Issuance of Order to Show Cause," Kirschke states that a medical expert, who testified at trial that postmortem lividity can become fixed in as little as two hours, testified at the superior court hearing on the writ that the minimum fixation time is six hours. At oral argument, Kirschke's counsel contended that the latter testimony is newly discovered evidence conclusively establishing Kirschke's innocence. The matter of fixation of postmortem lividity was thoroughly explored at trial. Thus, unless the new opinion points "unerringly" to innocence, it is not a basis for coram vobis relief. (In Re Imbler, supra, 60

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1. cont. from page A-17:
60 Cal.2d 554, 570, 35 Cal.Rptr. 293, 387 P.2d 6; In Re Branch, infra, 70 Cal. 2d 200, 214-215, 74 Cal.Rptr. 238, 449 P.2d 174.) Evidence points unerringly to innocence only when it undermines the entire case of the prosecution. (In Re Lindley, 29 Cal.2d 709, 723-724, 177 P.2d 918; see also In Re Imbler, supra, 60 Cal.2d 554, 569, 35 Cal.Rptr. 293, 387 P.2d 6.) Here the "newly discovered evidence" does no more than cast doubt upon one item of expert testimony received at trial. Nothing would have impelled Kirschke's accquital if the evidence at trial were the same as the testimony produced at the hearing on the petition for writ.

(6-8) Our discussion of the Wolfer testimony on ballistics, acoustics, and anatomy, concluding that its falsity is not an adequate ground of collateral attack, is equally applicable to Kirschke's contention that, as newly discovered evidence, the falsity requires that the judgment be vacated. What remains is Kirschke's self-serving testimony at the State Bar hearing. The writ of coram vobis will be granted on the basis of newly discovered evidence only if the petitioner "can 'show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits...'" (In Re Imbler, supra, 60 Cal.2d 554, 570, 35 Cal.Rptr. 293, 302, 387 P.2d 6, 15), or if he shows new evidence which points "unerringly to (his) innocence." (In Re Branch, 70 Cal.2d 200 214-215, 74 Cal.Rpt. 238, 449 P.2d 174.) Here Kirschke is asserting a fact known only to him. His failure to assert it at trial is unexplained. The self-serving statement does not point unerringly to innocence.

INEFFECTIVENESS OF TRIAL COUNSEL

(9-11) Kirschke contends that he was ineffectively represented by his lawyer at trial because his counsel failed to investigate and develop the falsity of the demonstrative evidence used by Wolfer to explain his ballistics testimony. To succeed in that contention, Kirschke must establish ineffectiveness of trial counsel as a demonstrable reality and not by speculation. (People v. Reeves, supra, 64 Cal.2d 766, 774, 51 Cal.Rptr. 691, 415 P.2d 35.) Here Kirschke can prevail only if we speculate that it was trial counsel error and not trial counsel tactics that prevented his calling a defense ballistics expert as a witness. Since a tactical decision, based upon investigation, is not ineffective representation (People v. Gardner, 71 Cal.2d 843 851, 79 Cal.Rptr. 743, 457 P.2d 575), Kirschke's contention fails.

ISSUES THAT WERE RAISED OR COULD HAVE BEEN RAISED ON APPEAL

(12) The remainder of Kirschke's petition seeks further review of issues decided adversely to him on appeal or which could have been, but were not, included in the appeal. Those issues are not available on collateral attack. (In Re Shipp, supra, 62 Cal.2d 547, 552, 43 Cal.Rptr. 3, 399 P.2d 571.)

DISPOSITION

The petitions for habeas corpus and coram vobis are denied.

WOOD, P.J. and LILLIE, J., concur.

APPENDIX B

IN RE KIRSCHKE

(HABEAS CORPUS, L.A. SUPERIOR COURT)

November 1, 1973

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In re JACK KIRSCHKE on Habeas Corpus.	No. A222633
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JACK KIRSCHKE, Defendant and Petitioner.	MEMORANDUM OPINION AND ORDER DENYING RELIEF

APPEARANCES

Roger S. Hanson for Petitioner.

Evelle J. Younger, Attorney General, Albert W. Harris, Jr., Assistant Attorney General, and Clifford K. Thompson, Jr., Deputy Attorney General, for Respondent.

HISTORY

Petitioner was convicted of the first degree murders of his wife, Elaine Kirschke, and her companion, Orville (Bill) Drankhan. The jury fixed the penalty at death, but the trial judge, the Honorable Kathleen Parker, upon denying petitioner's motion for a new trial, reduced the penalty to life

imprisonment. (Sec. 1181, sub.div. 7, Penal Code.)

While the appeal was still pending, petitioner filed his application for a writ of habeas corpus.[1/] The application was initially filed in the Supreme Court but was transferred by it to the Court of Appeal "for consideration in conjunction with the appeal."

Concurrently with its affirmance of the judgment in a nonpublished opinion filed on July 28, 1972 (Crim. No. 16044, 2nd Dist., Div. 1), the Court of Appeal determined that the petition "allege(d) sufficient grounds for the issuance of an order to show cause so that there may be an evidentiary hearing upon petitioner's allegation that his conviction was obtained by 'the knowing use of perjured testimony,'" and issued an order to show cause directed to the nominal respondent, Superintendent Bertram S. Griggs, returnable before this court. (Sec. 1509(b) Penal Code.)

1/ Petitioner was initially represented by Bruce Anderson Coewey, Esq., in addition to present counsel. Mr. Doewey is now deceased.

At petitioner's request the court appointed criminalists Alfred A. Biasotti and David Q. Burd as expert witnesses (Sec. 730, Evidence Code) to examine certain exhibits -- the death bullets, test bullets and various photographs -- introduced in evidence at the trial.[2/] Biasotti and Burd made their examination and submitted a joint report to the court. (Exh. HC-1.)

Prior to the evidentiary hearing, petitioner filed in the Court of Appeal an application for a writ of error coram nobis. That application was denied without prejudice to filing the same in this court, and petitioner's counsel, perhaps thinking he recognized a hint, filed a new coram nobis application in this court.

2/ Respondent's counsel did not join in the request for appointment of the expert witnesses, but once the court had made known its intention to grant the request, both counsel approved the designation of Messrs. Biasotti and Burd.

THE HEARING

Counsel had agreed that it would not be necessary for the court to read the entire 9832 pages of trial testimony, but designated certain material portions of the testimony, comprising several volumes of transcript, which the court read and considered.

At the evidentiary hearing, which consumed eleven court days, 28 witnesses testified and 32 exhibits were received in evidence.

Counsel's arguments were intially presented by way of written briefs. Upon conclusion of oral argument the matter was taken under submission.

THE ISSUES

As noted above, the basis of the Court of Appeal's determination of petitioner's entitlement to an evidentiary hearing was his "allegation that his conviction was obtained by 'the knowing use of perjured testimony.'"

Petitioner, however, sought to expand the scope of the hearing to include not only certain areas of alleged "perjured testimony" not originally included in his

petition, but also "incompetence" and "material errors of fact" by the same witness accused of perjury, De Wayne A. Wolfer; "newly discovered evidence" and "denial of due process of law" through "denial of effective assistance of counsel."

The Court of Appeal's order of July 28, 1972, required the respondent to show cause before this court why relief should not be granted petitioner, which is just about the same thing as issuing the writ of habeas corpus and making it returnable here. The effect is the same as if the petition had been filed here in the beginning. Hence, unlike the situation that would have existed if the undersigned had been designated as a referee to make findings of fact on specific issues and render a report, the scope of the hearing is not necessarily limited by the allegations of the habeas corpus petition nor by the Court of Appeal's order.

A brief comment as to the petition for a writ of error coram nobis is also in order: Section 1265, Penal Code, provides that ". . . if a judgment has been affirmed

on appeal no . . . petition for a writ of error coram nobis shall be brought . . . except in the court which affirmed the judgment on appeal." Petitioner, having initially filed his application in the proper court, claims that court's denial "without prejudice to filing in the Superior Court" now vests jurisdiction here to consider the coram nobis claim. He argues correctly that he had in fact "brought" his claim in the Court of ppeal, but less authoritatively that he can proceed here now that the Court of Appeal has refused to hear him.

This court has agreed to treat the allegations of the coram nobis petition as a supplement to the habeas corpus petition, which should satisfy petitioner, inasmuch as the scope of habeas corpus is certainly broad enough to grant any relief available on coram nobis.[3/]

3/ It comes to mind that if this court is wrong on the jurisdictional point, and should have entertained the coram nobis petition as such, petitioner will have the right to take a direct appeal, a remedy not available to him on denial of habeas corpus.

PETITIONER'S CLAIMS

Petitioner has attempted to demonstate that De Wayne A. Wolfer committed perjury in the following instances:

1. In identifying the Kirschke and Drankhan bullets as having come from a revolver owned by petitioner.

2. In stating that as a part of his educational background he and another undergraduate fully dissected a human cadaver.

3. In testifying that the body of Drankhan traveled from the bed to the floor of the Kirschke bedroom by the shifting of "body fluids."

4. In testifying that a gun silencer could reduce sound level a certain number of decibels.

Petitioner's additional claims of prosecutorial negligence and material errors of fact stem from the same Wolfer testimony. The "newly discovered evidence" is simply the evidence that (allegedly) Wolfer lied (or was wrong). The "denial of effective assistance of counsel" -- a polite way to term petitioner's trial counsel incompetent -- is predicated upon that counsel's failure

to undertake an independent investigation and comparison of the death and test bullets.

EVIDENCE

1. Wolfer's identification of the death and test bullets.

At the trial, Wolfer testified that the Kirschke and Drankhan death bullets came from petitioner's gun "and no other gun in the world." He testified that he examined under a microscope each of the death bullets alongside a bullet fired from Kirschke's gun, rotated the bullets "into phase" and saw matching striations which enabled him to reach his conclusions. He made photographs so he could show the jury the "areas of concern."

Exhibit HC-8 (see also trial exh. 99) shows the Kirschke bullet (trial exh. 36) on the left and test bullet T-1 (trial exh. 82) on the right.

Exhibit HC-9 (see also trial exh. 100) shows the Drankhan bullet (trial exh. 41) on the left and test bullet T-1 (trial exh. 82) on the right.

Exhibit HC-10 (see also trial exh. 101) shows the Drankhan bullet (trial exh. 41) on the left and test bullet T-1 (trial exh. on the right.

Exhibit HC-11 (see also trial exh. 102) shows the Drankhan bullet (trial exh. 41) on the left and test bullet T-1 (trial exh. 82) on the right.

At this point it is not possible to determine with any degree of certainty what Wolfer saw in the microscope several years ago. But both the court's experts, Biasotti and Burd, and petitioner's expert, Harper, agree (and respondent does not now contest) that there is a serious error in one or more of the photographs Wolfer took of the Drankhan death bullet.

The essence of the problem is that somehow Wolfer compared a single land impression from test bullet T-1 with two different land impressions on the Drankhan bullet to prepare trial exhibits 101 and 102.

Initially both Biasotti and Burd had been in agreement that trial exhibits 100 and 102 were "in phase" with each other and 101 was not. Hence if 101 showed "points of identity," 100 and 102 could not, and vice versa.[4/]

4/ This subject is explained much more fully in exhibit HC-1, a copy of which is attached to this order as Appendix "A".

On recall to the stand, however, Biasotti testified that he thought 100 and 101 were in phase with each other -- and 102 was not. Burd was not recalled.

In Harper's opinion, 100 and 101 both match parts of the same land in the Drankhan bullet to two different lands in test bullet T-1. (See exhs. HC-P, HC-Q, HC-S, HC-T.)

Both Baisotti and Burd reached the conclusion that they could not make the specific identifications between the death and test bullets made by Wolfer -- but they could not positively exclude such identification, nor could they exclude the possibility that a prior specific identification could have been made. They reached the further conclusion that certain of the "fine identifying individual characteristics which are apparent in these photographs are now obscured or removed by what appears to be a combination of oxidation and wear."

Although Wolfer testified at the evidentiary hearing that he took the comparison photographs and showed them to the jurors only to demonstrate "areas of concern," it seems quite clear he used the photographs to convice them that the bullets indeed matched.

But at this late date we know that at least one comparison in the 100-101-102 series must have been wrong.

Being wrong, however, does not make one a perjurer.

2. Wolfer's testimony as to educational background.

Wolfer testified, in establishing his qualifications, of having been assigned, along with another undergraduate pre-medical student, to fully dissect a human cadaver.

Petitioner presented substantial evidence negating the availability of a cadaver to be assigned to only two students. He elicited from a number of Wolfer's former classmates differing recollections, but no confirmation of Wolfer's experience. One student recalled no laboratory phase to the course at all; others did remember the laboratory; there were varying recollections as to the number and description of cadavers. Some students recalled performing limited dissection. One student, admittedly not a very persuasive witness, recalled extensive dissection by a small laboratory group.

In short, the evidence is conflicting and this court is simply not convinced that

Wolfer, whose memories may not be correct, actually lied about his dissection experiences.

3. Wolfer's testimony as to other scientific matters.

It is manifest that Wolfer knew very little of what he was talking about when he explained the shifting of "body fluids" and undertook to explain the quantum of sound reduction that could be achieved by use of a silencer on a handgun.

But just as error is not the equivalent of perjury, neither is ignorance.

4. Alleged ineffectiveness of trial counsel.

This contention is made with somewhat less enthusiasm than the attacks on Wolfer. The court might be inclined to take the argument more seriously had petitioner seen fit to call trial counsel as a witness and give him the opportunity to answer the belated charges.

Suffice it to say that in the absence of any other eivdence on the issue this court will not second-guess the trial attorney, who appears as a matter of

stategy to have bypassed the opportunity to have his own examination of the death and test bullets. No showing of withdrawal of a crucial defense has been made; the trial was certainly not reduced to a farce or sham.

THE LAW

The court has examined all of the authorities cited by counsel, not to mention a few unearthed by its own efforts. In particular, In re Imbler, 60 Cal.2d 554, and the authorities cited therein, particularly at p. 567, Imbler v. Craven, 298 F.Supp. 795, In re Branch, 70 Cal.2d 200, People v. Sarazzawski, 27 Cal.2d 7, In re Ferguson, 5 Cal.3d 525, and Giles v. Maryland, 386 U.S. 66 have merited careful scrutiny.

What the court has been seeking is any persuasive California or federal authority that erroneous although nonperjurious testimony is the equivalent of willful suppression of evidence. No such authority has been found, and accordingly petitioner is not entitled to relief on that (or any other) theory.

FINDINGS, CONCLUSIONS AND ORDER

Petitioner has not established by a preponderance of substantial and credible evidence those facts necessary to entitle him to relief.

De Wayne A. Wolfer did not commit perjury at defendant's trial.

Petitioner was not denied due process of law at his trial by virtue of:

(a) Any alleged negligence or errors of fact in Wolfer's bullet comparison procedures;

(b) any alleged denial of effective assistance of counsel; or

(c) any other fact.

Petitioner has presented no newly discovered evidence which undermines the case presented by the prosectuion at the trial.

The order to show cause is discharged and the petition for a wrot of habeas corpus is denied.

The petition for a writ of error coram nobis is dismissed for lack of jurisdiction.

Dated this first day of November, 1973.

GEORGE M. DELL

GEORGE M. DELL
Judge of the Superior Court

APPENDIX C

DENIAL, PETITION FOR REHEARING

CALIFORNIA COURT OF APPEALS

POST CARD

CLERK'S OFFICE
Court of Appeal
SECOND DISTRICT
3580 WILSHIRE BOULEVARD
SUITE 301
LOS ANGELES, CA 90010

Roger S. Hanson

518 S. Broadway

Santa Ana 92701, California

Los Angeles, Cal. DEC 3 1 1975, 19____

TITLE { In re Kirschke on Habeas Corpus / ss. } *No.* 26380

THE COURT:

Petition for rehearing denied.

CLAY ROBBINS, *Clerk*

31610-113 3-75 6M ① OSP

APPENDIX D

DENIAL, PETITION FOR HEARING

CALIFORNIA SUPREME COURT

Roger S. Hanson, Esq.
518 South Broadway

Santa Ana, Ca. 92701

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JAN 28 1976

I have this day filed Order

HEARING DENIED

In re: 2 Crim. *No.* 26380

Kirschke on Error Coram Vobis

vs.

Respectfully,

G. E. BISHEL
Clerk

38365-877 7-75 3M OSP

APPENDIX E

PROSECUTORIAL ARGUMENT TO THE JURY

CONCERNING POLICEMAN

DE WAYNE ALLEN WOLFER

-A-

In this appendix we set forth the salient trial testimony on the concept of lividity initial formation as distinguished from lividity fixation, noting that prosecution pathologist Graham initially correctly stated that 6-7-8 hours were required for it to attain permanent fixation, and then erroneously stating later that 2 hours were sufficient for permanent fixation.

At the March-April, 1973 reference hearing, Dr. Graham admitted his critical trial mistake concerning the eroneous figure of 2 hours, explaining that he misunderstood that inquiry to be directed to when the lividity first became discernible.

We follow initially with the trial testimony on lividity, and conclude with the prosecutor's argument on the consequences of the lividity on the alibi, and the solution of that prosecution trial problem by the false testimony of policeman DeWayne Wolfer, now shown to be a false prosecution witness:

(a) Lividity

Before beginning the charting of the ubiquitous "lividity issue" which threaded itself through the trial, we must warn of the prosecution trial error in lividity fixation time. In the case in chief, at trial, Prosecution Pathologist Dr. J. Wallace Graham testified initially under cross-examination, as follows, R.T.A. 2949ff:

"Q. Is there something on the body of a dead person called lividity?

A. Yes.

Q. What is that?

A. This is a color, a reddish color, imparted to the surface of the body which is most dependent, the blood settling to the dependent portions of the body.

For instance, if the body is lying on its back, the blood will settle in that direction and impart a bright red color to that area.

Q. When does the blood settle and thus impart its color in relation to the time of death?

A. After death.

Q. What is it that causes the set-

tling of the blood?

A. Gravity.

Q. Does this situation that we call lividity develop while the heart is still pumping?

A. By definition, no. Livor mortis indicates the individual is dead, while if the heart is still going, the individual is alive.

Q. Technically alive; is that right?

A. Yes.

Q. Probably actually, too; is that right?

A. Yes.

Q. How soon after life ceases in the body does a demonstrable livor mortis or lividity show?

A. Oh, it depends on the situation. In some individuals it is discernible within an hour.

Q. So that if a person at death is lying on his back and stays there for an hour or more, you would anticipate the lividity to be on the posterior portion of the body; is that right?

A. That's correct.

Q. If after the lividity has set in

the body is moved, is there then a change in the movement of the blood thus having arrived at the lower portion?

A. Yes. If the body is moved within a certain amount of time.

Q. Within what time have you known of lividity moving?

A. Oh, this is extremely variable. For instance, if the body is on its back for several hours and it is turned over, say, on its abdomen, there could possibly still be movement of blood in that particular direction, or to the dependent portion of the body. After a certain amount of time, six, seven, eight hours it becomes fixed..

Q. Does that mean at that point the body, the blood in the body has coagulated so that it no longer moves about?

A. Not necessarily coagulated, but certain tissue changes have occurred with, say, breakdown of proteins, that it slows or impedes the movement of blood back into a direction if the body is moved.

Q. Did you observe this condition called lividity on either body?

A. Yes."

We note in the foregoing testimony a clear, lucid, correctly presented demarcation between the:

(1) initial discernment or initial visual observance of lividity formation, which is reversible, which is to be distinguished from lividity fixation or permanence, and

(2) the permanent, irreversible fixation of lividity.

Dr. Graham correctly testifies that "in some individuals it is discernible in an hour, but "after a certain amount of time, six, seven, eight hours it becomes fixed."

Scientifically, the foregoing testimony correctly sets forth the fact that in about 1 or 2 hours after death lividity may be seen to be developing, but if at that time, or any time up to, say 6 hours after death, the body is reversed, or rolled over, the blood causing the initial discernment of the lividity will drain out of the skin capillaries and the skin capillaries at the opposite side of

the body will start to receive blood which will eventually become discernible in the new location.

However, "after a certain amount of time, six, seven eight hours, it becomes fixed," according to Dr. Graham. The foregoing Dr. Graham testimony was essentially scientifically accurate, although we note at pages 163 thru 189 of our Petition for Writ of Habeas Coepus, filed January 13, 1975 in the Second Appellate District, that recognized medical, scientific works set 8 to 12 hours as the lividity fixation time.

See also affidavit of Dr. Griffith Thomas, a board certified Pathologist, pages 143 thru 163 of the above cited Petition for Writ of Habeas Corpus.

For the purposes of the instant case an attempt to distinguish between 6 hours or 8 hours or 12 hours is not necessary.

Strangely enough, during subsequent cross-examination, Dr. Graham then presented the following incorrect testimony on lividity fixation time, R.T.A. 2969ff:

"Q. Let's assume now that he was found face down, and let's assume that he had been face down for at least 24 hours before he was discovered.

Did you find any lividity on the anterior aspect of the body?

A. No, it was described to be on the posterior aspect of the body.

Q. Bearing in mind what you have told us a little while ago about livedities, perhaps changing even after death when bodies are moved, in your opinion how long would that body, minimum-wise, had to have lain dead on its back for the lividity to form posteriorly and not change when the body reverted to its face or moved to its face?

A. Oh, two hours.

Q. In your opinion in two hours the lividities would have been so set that a complete reversal of the body from back dwon to face down would not alter them; is that right, sir?

A. Yes. Now, when I give a figure of two hours there is considerable leeway in either direction; this is not a hard and fixed rule and many things can

modify it depending on how much blood is lost and other certain factors.

Q. Do you now have an opinion, based upon what you observed with respect to the body, the loss of blood as it appeared to you in the course of the autopsy, and any other factors that you observed in the course of the autopsy, do you now have any opinion as to the minimum period of time that that body would have had to have lain on its back to have been found in the condition that you--to have been in the condition that you observed it at the autopsy when some time after death the body moved over on its face?

A. I'll give you a time of two hours, I believe, with reservation that it could go one way or the other.

Q. Is two hours your best minimum time based upon everything that you have learned all these years in your study and experience?

A. I can't say two hours definitely; I can say about two hours.

Q. But is that your best opinion?

A. Yes."

Noting the obvious and clearcut conflict between these 2 times, 6-7-8 hours on one hand and 2 hours on the other hand, the discrepancy was cleared up by Dr. Graham when called as a witness at the March-April, 1973 reference hearing held before the Honorable George M. Dell of the Los Angeles County Superior Court.

Dr. Graham there explained that his "two hours" fixation time was erroneous, he then erroneously, mentally lapsing at that time into thinking the question propounded was directed to when the lividity was initially discernible rather than the time to permanently fix.

It is to be noted that the erroneous 2 hours was seized upon by the prosecution as the minimum time that Drankhan's body had to lay after death before it was moved to insure lividity fixation, when in fact the true scientific 6 hours to 8 hours minimum time would absolutely preclude KIRSCHKE from carrying out the killing and transfer of the body.

Nonetheless, recognizing that KIRSCHKE was in Las Vegas checking into the

Hotel at about 8:30 a.m., it was clearly recognized by the prosecution and admitted that KIRSCHKE must have had to leave the Naplès apartment at 4:00 a.m. at the very least to make the 4 hour, 32 minute automobile trip to Las Vegas, under the prosecution theory of the case.

For a killing that commenced by gun shots occurring at 2:30 a.m., as testified to by prosecution witness Frank Cornell, the upstairs neighbor, even this 2 hour minimum time, albeit erroneous, left the prosecution with the impossibly deficient time of 1-1/2 hours from 2:30 a.m. to 4:00 a.m. for lividity to permanently fix in the body of Drankhan, even assuming death occurred instantaneously at 2:30 a.m. If death did not occur instantaneously at 2:30 a.m. from the gun shot wound, of course even less time[1] was then available, perhaps just a

---

[1] We note that Senator Robert F. Kennedy lingered in life in Los Angeles, in June, 1968, over a day, passing through a major surgical operation on his brain, before passing away; Abraham Lincoln was transferred to a cheap room across the street from Ford's Theatre in Washington to linger hours before passing away. Nothing proved that Drankhan died instantaneously at 2:30 a.m.

matter of minutes,between the undetermined actual death time and the time of 4:00 a.m. the time KIRSCHKE must have left the death scene, under the theory of the prosecution, to drive to Las Vegas to check in at about 8:30 a.m. at the hotel in Room 415. The check-in time was established by Bobby Lancaster, the prosecution witness Bellhop from the hotel.

We note in passing that the Court of Appeals at page 13, slip opinion, footnote 1, recognizes the trial testimony discrepency in the lividity fixation times, but continues to not recognize or realize the significance that that testimony played in the trial nor does it recognize how the establishment of the correct 6 hours insures KIRSCHKE'S "unerring innocence," for he was then in Las Vegas, Nevada at the time the killer moved the body. That footnote said, at pages 13 & 14:

"Inferentially by a footnote in a document entitled 'Traverse to Response-Supplemental Points and Authorities in Support of Issuance of Order to Show Cause,' Kirschke states that a medical expert, who testified at trial that post-mortem lividity can become fixed in as

little as two hours, testified at the superior court hearing on the writ that the minimum fixation time is six hours.[3] At oral argument, Kirschke's counsel contended that the latter testimony is newly discovered evidence conclusively establishing Kirschke's innocence. The matter of fixation of postmortem lividity was thoroughly explored at trial. Thus, unless the new opinion points "unerringly" to innocence, it is not a basis for coram vobis relief. (IN RE IMBLER, supra 60 Cal. 2d 554, 570: IN RE BRANCH, infra 70 Cal. 2d 200, 214-215.) Evidence points unerringly to innocence only when it undermines the entire case of the prosecution. (IN RE LINDLEY, 29 Cal. 2d 709, 723-724 [177 P.2d 918]; see also IN RE IMBLER supra, 60 Cal. 2d 554, 569.) Here the "newly discovered evidence" does no more than cast doubt upon one item of expert testimony received at trial. Nothing would have impelled Kirschke's acquittal if the evidence at trial were the same as the testimony produced at the hearing on the petition for writ."

As we explain elsewhere in this Petition, the 6 hour lividity fixation time does unerringly establish KIRSCHKE'S innocence, and the role of the false

[3]. Of course, as we showed above by direct quotation from R.T.A. 2949ff., that "medical expert" had established on one occasion at trial that the minimum fixation time was 6 hours.

Wolfer anatomy testimony, with its accompanying false "fluid shifts" went to the merits of the case in a material manner in "explaining" by false scientific evidence how the Drankhan dead body moved many hours after death, unaided by human impetus. This false evidence was used by the prosecution to obviate KIRSCHKE remaining at the death scene to move the body and thus its materiality is not open to question.

As we explain elsewhere in this Petition, the development and permanent fixation of post-mortem lividity in the posterior area of the body of Orville William Drankhan conclusively establishes that his body had to lay on its back for some 6 to 8 hours, at least, and then get turned over on its face by some external force. For a killing that occurred, under the best prosecution evidence, at 2:30 a.m., on April 8, 1967, even assuming instantaneous death that body could not have been moved before 8:30 a.m. on Saturday, April 8, 1967, the exact time that prosecution witness bell-hop Bob Lancaster is check-

ing Petitioner, JACK KIRSCHKE, into the Stardust Hotel Room 415, where he gets tipped by KIRSCHKE with a gambling chip from a different Las Vegas hotel, obtained at the other hotel prior that morning by JACK KIRSCHKE, i.e. from the Desert Inn.

We present the foregoing in detail because the prosecutor seized on the erroneous 2 hours lividity fixation time rather than the correct 6-7-8 hour lividity fixation time in the following closing arguments to the jury wherein he emphasized the importance of the testimony of DeWayne Allen Wolfer.

We need only cite what prosecutor Albert W. Harris told the jury that the importance of Wolfer's testimony was: When we do that, we foreclose any contention that his false evidence went to "irrelevant issues" in the case, or went to "an unexplained phenomenon which is virtually irrelevant to KIRSCHKE'S guilt or innocence", or dealt with "testimony which did not concern the heart of the matter", or went to testimony which "could not, beyond a reasonable doubt,

have affected the outcome of the trial..." (page 12, December 2, 1975 slip opinion).

Harris said, in his final address to the jury, concerning Wolfer and his key demonstrations supported by his falsified evidence, that Wolfer had solved the problem that the state had with the defense alibi.

Prosecutor Harris was quite cognizant of the key issue of the case being the defense alibi, and he directed his argument to attacks thereon. From R.T.A. 9338:

"All right. Now, let's get this alibi out of the way, and I'm going to take some time on this..."

"Not very much; not very much, but here and there, because we are focusing in for the next hour and fourteen minutes on what is no doubt the critical issue in the case...."

From R.T.A. 9339:

"Right at the end, just before the Bible, just before the emotions are raised, but I have got to get to this alibi this morning because I want to get through it, and there is quite a bit of evidence to discuss. It is, as I said before, I think the critical issue in the case."

Prosecutor Harris emphasized that

time was a critical factor in the alibi. From R.T.A. 9340:

"...because time is a critical factor in this case, and there is no question about it..."

Prosecutor Harris recognized that the 2:30 a.m. gun shot time testified to by his witness, Frank Cornell, served to establish the KIRSCHKE alibi, but if he could advance the time, he could circumvent the problem. From R.T.A. 9369ff:

"Now, you remember yesterday two-thirty was pulled out of the air. That is the only time. It makes sense. Sure, it makes sense. After all, Mr. Cornell said two-thirty. But did he say gunshot wounds? How does the medical evidence affect that? Because 2:30 will do the job for the defense and at two o' clock the whole alibi falls to peices, the whole alibi collapses.

Now, why do I say that? If the killing was before two o'clock, and bear in mind we have got to have the other point between two and something else, some time prior to that--and I'll go along with Mr. Ramsey: 1:10, 1:20. You name it. 1:30, if that keeps everbody happy, that they leave the Yacht Club.

Once you start going back from two o'clock, the killing occurred in that period of time. Then we look at Yermo. I am going to go into that in a moment. But at 2 a.m.--you will recall how far it is to San Bernardino. I am sure you

know anyhow. It was a little over 60 miles, as I recall the evidence and the stipulation. An hour later, three o'-clock in the morning. San Bernardino at three. And then what is it to Yermo? Another hour and fifteen minutes? Now, that is getting pretty close to four o'-clock in the morning; it is getting too close to four o'clock in the morning.

Now, you heard yesterday that we were critical of Frank Cornell, it has to do with the physical evidence, it has to do with the medical evidence, it has to do with what that shows as to the time of killing. Because that is critical to this alibi.

You can say, well, take 2:30. I can say take 12:30. But let's look at the evidence and see what that shows. We say it shows the killing was prior to two o'clock.

What did Frank Cornell hear? Maybe he heard the body coming off the bed, I don't know. I don't think it was the gunshots because there is absolutely nothing to substantiate that and the condition of the stomach militates against it."

The prosecutor realized that his prosecution's pathologist, having once said 6-7-8 hours was necessary for lividity to fix, then switched to the erroneous 2 hours, but even that 2 hours was recognized to be of great benefit to the defense for KIRSCHKE could not have remained for 2 hours after the killing and

still get to Las Vegas. From R.T.A. 9410 (note how the prosecutor admits that "2:30 a.m. isn't good enough" for his conviction in his final address to the jury):

"No, we find something that develops late in the trial, quite late in the trial after some sixty some defense witnesses have gone up on that witness stand, and I'll tell you what I think motivated it. I think what motivated it is what I have been telling you about for the last two hours. I think it became clear to the defense that that alibi had too many holes in it. It had too many leaks. It was sinking rapidly.

Jean Ledet and his prior testimony, Dennis Baily, being impeached about this prior incident when Jack Kirschke walked in; Peggy Peterson and a plate of sausage and toast, that is not strong enough. They needed some help. What did they need? They needed the killer in that house for two hours.

Now, when the People closed their case after calling our 49 witnesses, you heard Frank Cornell, and you had heard about the 2:30 that you were told about yesterday. That was the time. And all of a sudden that 2:30 wasn't good enough, and I agree, it isn't good enough. They have got to put the killer in that house for two hours, and why do they have to put the killer in that house for two hours? Only because of the alibi. There is no other reason. To shore up that alibi. Add two hours to it and you can criticize Baily, Ledet, and everybody else, but if the killer had to be

in that house for two hours and Jack Kirschke was anyhere out there on that road, you are never going to believe he did it.

So now we've got into the two hour routine in the house, in the house in Naples, and how much evidence dame in on that issue? How many witnesses, how many days did we spend on it?

Mr. Harper took the witness stand. He testified to two things, the path of the bullet--now, pardon me, he didn't testify to the path of the bullet, he said the bullet ricocheted, which is very interesting, and he testified that somebody had to pull the body off the bed, and that the body had to be on the bed, Mr. Drankhan's body, for two hours for lividity to fix, because they had seen that line in the autopsy report, posterior lividity, and this is the answer, somebody's in that house for two hours and pulls Mr. Drankhan off of the bed.

Now, if they can get that thought over to you, two hours, add two hours, then let Harris take on our witnesses, add two hours to the 2:00 o'clock or 2:30, and then what does that alibi look like? It looks real good.

So now we have got to have a man in that house for two hours, and they proceeded to put a man, or woman--there is some talk about a woman--somebody in that house for two hours.

Now, I say the reason we got into that whole production that went on for days and days and weeks, and finally culminated in LeMoyne Snyder being called down here at the last minute, was for

one reason, and that is the defense realized their alibi had too many holes in it, and they needed two more hours. What other explanation is there for it?

What difference did it make if the body was pulled off the bed by somebody? Why couldn't Jack Kirschke pull it off as well as anybody else? It didn't have anything to do directly with Jack Kirschke, it had to do with those two hours, because if he could convince you somebody was in that house for two hours, you're going to buy that alibi, and you know why you can believe Jack Kirschke. That is the theory, and that is why we spent the weeks on that, and that is why we had the lividity until we were all sick and tired of it.

I'm not going back to all of that testimony by Mr. Harper and Dr. Ridge. The basic thought was a very simple one, dead men don't get up and move around. I think we all agree with that. Of course they don't. But the thing I kept asking Mr. Harper, and I liked Mr. Harper, he's certainly a very amiable and likable man, I kept asking him where was Mr. Drankhan on the bed.

Now, isn't that of some importance? And the answer I get, 'Well, he was on his back.' Well, all, right, he was on his back. He had posterior lividity. Well, where was he on the bed on his back? Well, we don't know. He had to be flat on the bed. How else could he lay on the bed. Very simple. He had to be flat on his back on the bed for two hours, and somebody had to come in there and throw him off the bed, throw him to the floor.

Dr. Ridge backed up that theory, and there we were. Two more hours. Add that to the alibi and you would have heard a day of argument here about how two hours added to whatever time you wanted to start with, you could go back to 1:00 o'clock or anywhere, and there is no way Jack Kirschke could have done it, but the two hours don't mean anything without the alibi."

The prosecutor recognized the role of Wolfer in destroying the necessity of the 2 hours by his spurious "fluid shift" and anatomy testimony. From R.T.A. 9419:

"Now, let's go back for a moment. What had all this got to do with the case? The question is whether Jack Kirschke committed the murder. Now, what does a body coming off the bed have to do with that? What is all this argument about the respective abilities of Mr. Wolfer and Dr. Snyder? What does that have to do with the case?

The only thing I can think of, and I racked my brain about this, such as it is, is they need that two hours, and they need somebody in that house for two hours, and this is the way they get it, through what is, on its face, a pretty sensible proposition; when a man is dead on a bed, he doesn't get up and walk around. Of course not."

The prosecutor then emphasized how Wolfer had destroyed the alibi by his

circumventing the 2 hour lividity fixation time: From R.T.A. 9423-9424:

"Again, what differnce does it make? It could have been Jack Kirschke in either area. If he wasn't there, then it was somebody else. So what is the defense so excited about? Well, as I told you there are two things it seems to me they are excited about: one is that two hours. They have to have that two hours. And when DeWayne Wolfer is through testifying I don't think anybody in this courtroom believed somebody hung around that house for two hours in order to throw Bill Drankhan off the bed that he couldn't hardly have stayed on if he wanted to once his back got parallel to that bed. You saw the man right out here--not Mr. Drankhan, you saw the man who was about his size and he was put on the bed by those bloodstains.

I could see the defense getting excited about that. But why did they get excited about the trajectory? What difference to them whether it is in the closet area, near the door in the living room? What is the difference? He said he wasn't there, he didn't do it--at least that is what the defense is, it is what his attorney says. Why do they get upset about Mr. Wolfer? I didn't see it at the time. I saw they were upset, it didn't take too much to tell that. If you have ever seen the panic button pushed in a courtroom it was pushed when DeWayne Wolfer left the witness stand. The phone call goes up

to Paradise to Dr. Snyder, Mr. Harper heads off to run off one of his experiments to see how much of this stuff you get out when you shoot a gun through a towel. He does it outside in the wind where a lot of it blew away, he says, so there really is a lot more. That's a fine way to conduct a scientific experiment. We had to have a recess for a couple of days so this great Dr. Snyder could come down here and examine the evidence. Of course, at that time he wasn't identified to you--some great expert was going to come down here."

And from R.T.A. 9438:

"But your integrity is the one thing that is imperative, and without that you might as well forget about it. And that would go for Jack Kirschke when he was a District Attorney, and it goes for all the Deputy DA's, I don't know how many there are, in this County. It is true of the criminalists. Without that integrity they don't have anything. They don't have anything. And yet the integrity is called into question. Why? What did Officer Wolfer do that was so terrible? Did he say Jack Kirschke pulled the trigger? I don't recall him saying that.

What he did was demolish that two hours. And when he demolished that two hours, as I said before, they pushed the panic button and they went to these extreme lengths, even up through yesterday, to convince you that Mr. Wolfer didn't know what he was talking about because they are still not happy with two-thirty.

We went through all that this morning. They have got to have that two hours. They don't have it."

The prosecutor clearly emphasized how the testimony of Wolfer, now proven false, truly emasculated the scientific lividity defense of the Petitioner.

We belabor this argument because we have taken issue with the key and erroneous conclusion formed by the Court of Appeals at pages 11-12 of the slip opinion of December 2, 1975, IN RE KIRSCHKE 53 Cal. App. 3rd 405, and we are compelled to summarize for this Honorable Court exactly how the prosecutor hammered home the importance of the alibi and how it had been destroyed both by the acoustics and silencer changing the time of the shooting, and secondly, Wolfer causing the body to move by "fluid shifts".

Because of this clearly significant issue in the trial of Petitioner, the Court of Appeals of California is clearly erroneous in stating that the role of Wolfer, his qualifications, his falsification thereof, and his obvious-

ly false testimony had and played no role in this conviction. Chapman v. California, 386 U.S. 18, 24 (1967); People v. Ruthford, 14 Cal. 3rd 399, 406-409; In Re Imbler, 60 C.2d 554, footnote 2 at 564-565.

-B-

THE FALSE BALLISTICS EVIDENCE PROPOUNDED BY STATE AGENT POLICEMEN DE WAYNE ALLEN WOLFER:

Both the Court of Appeals and the Superior Court now recognize that false ballistics evidence was used to achieve the conviction.

In its July 28, 1972 unpublished opinion, the Court of Appeals alluded to the ballistics evidence no less than 4 times, contending it to be the significant evidence in the case. It is now known to be falsified, but now the Court of Appeals excuses this as "honest error."

In its opinion affirming the conviction on July 28, 1972, that Court said, inter alia:

(Page 19, SLIP OPINION)

"...Most significant of all, however, is the unrebutted fact that the murder instrument was appellant's .38 caliber revolver, normally kept in a bedside table out of sight."

(Page 19-20. SLIP OPINION)

"...here the evidence points only to appellant, that the most damaging of that evidence is that the murders were committed with his gun."

(Page 26, SLIP OPINION)

"...it is a fair inference, also, that appellant awaited the return of Elaine and Drankhan from the Yacht Club, armed himself with the .38 caliber revolver in the bedside table and shot them as they lay on the bed. ...Moreover, it is not evidence of consciousness of guilt that connects appellant most strongly with the murders but rather the undisputed fact that the .38 caliber revolver in his possession was the murder weapon."

(Page 35, SLIP OPINION)

"...the critical evidence in the case at bench is appellant's motive, his unusual conduct prior to the shootings evidencing that motive, his contrived false alibi and his possession of the murder weapon."

We present a mere sampling of the myriad of permeating references to the now known false ballistics evidence made by the prosecuting attorney in his closing remarks to the jury to show that harmless Chapman error cannot be ascribed to this falsification of key evidence by the State agent policeman DeWayne Allen Wolfer:

References Are to Reporter's Transcript on Appeal, Trial

1. "Our theory, which I told you I was going to expound today, is this: The theory of the People is that Jack Kirschke took his revolver, and he shot his wife, and he shot Orville Drankhan, and he killed them. That is the theory of the People. (8985)

   It happened in Jack Kirschke's house it was Jack Kirschke's gun, it was Jack Kirschke's wife, it was Jack Kirschke's wife's lover, and we submit he pulled the trigger."

2. "He did it with his gun in his apartment." (8986-87)

3. "...and that someone killed them with what we submit was Jack Kirschke's gun." (8988)

4. "Now, what gun were these bullets fired from? He said that, in his opinion, based on his examination of those bullets and his experience and his training, that all of the bullets that he examined, the Sheriff's test bullets and both bullets removed from the bodies of Mrs. Kirschke and Mr. Drankhan were fired from the same gun. They were fired from that gun, and they were fired from no other gun in the world." (9012)

5. "So we submit to you that it is not a matter of any reasonable doubt, but a matter of no doubt whatever that Jack Kirschke's gun fired the bullets that killed Elaine Kirschke and Bill Drankhan." (9013)

6. "He is the only person in the evidence presented here in three months that knew anything about this gun, and that is the gun that these people were killed with." (9019)

7. "They were taken by surprise by someone with Jack Kirschke's gun." (9022)

In finalizing his closing argument to the jury, the prosecutor said concerning the now-known false ballistics evidence:

"I can't see the physical evidence being explained in any way except coming through that door, surprising the people, pulling that trigger twice, and having the gun when you come in that house, and there is only one man that we know of from the evidence in this case who could have had that gun, only one man, so our case is based, ladies and gentlemen, on this, matters that I have explained here as best I can, the motive, the means, the opportunity, the guilty conscience."

"It was Jack Kirschke's house, it was his wife, it was his wife's lover, it was his gun.

We submit he killed these two people, and that he is guilty of murder in the first degree."

CONCLUSIONS

Because of the gross violation of the fundamental mandates of Brady v. Maryland, 373 U.S. 83, 87; Napue v. Illinois, 360 U.S. 264, 269; and United States v. Giglio, 405 U.S. 150, this Court is commanded by Townsend v. Sain, 372 U.S. 293, 316, to examine this conviction under the due process requirements of IN RE WINSHIP, 397 U.S. 358.

Certiorari should be granted.

DATED: April 10, 1976.

Respectfully submitted,

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